Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 166

JOHNSON & HIGGINS OF CALIFORNIA,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 21, 1932

CERTIORARI GRANTED OCTOBER 10, 1932

(36,863)

(36,863)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 23, 1932

[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 166

JOHNSON & HIGGINS OF CALIFORNIA, Petitioner,

vs.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Johnson & Higgins of California, prays that a writ of certiorari issue to review a judgment of the Court of Claims (fol. 18) entered on the 4th day of April, 1932 ordering that the petition be dismissed.

Special Findings of Fact and Conclusions of Law were made by the Court of Claims (fol. 10 to fol. 12) and an opinion not yet reported was rendered (fol. 12 to fol. 17). [fol. 2] Jurisdiction of this Court is provided by Section 288 of Title 28 of the United States Code.

Statement of Facts

In December, 1918 the United States Army Transport "Logan" was engaged in a voyage from San Francisco to Manila with a general cargo aboard which consisted in part of supplies for the American Expeditionary Forces in Siberia, supplies for the American troops in the Philippine Islands, supplies belonging to the Government of the Philippine Islands, supplies belonging to the American Red Cross and property of the Manila Railroad Co., together with a small amount of personal property of a commissioned officer and of a warrant officer of the United States Army. All of this cargo was being transported on said vessel free of charge (fol. 11 and 12).

The "Logan" was under the operation, management and control of the United States (fol. 10).

During the course of the voyage a serious fire which imperilled the ship and her cargo broke out on the "Logan" which was extinguished by the officers and crew of the vessel, and the vessel and some of the cargo was thus saved from destruction by the general average sacrifice. Extinguisiing a fire with water that damages cargo is one of the commonest of general average cases. A portion of the [fol. 3] cargo was damaged by the water with which the fire was extinguished (fol. 10). Some or all of the cargo aboard the United States Army Transport "Logan" at the time of the fire was covered by private insurance against general average losses.

On August 22, 1922 Hugh Williams, Captain, Q. M. C., and Administrative Officer, Army Transport Service, wrote petitioner, professional average adjusters, with reference to preparing a general average statement, enclosing papers with reference to the fire mentioned above and requesting "that the necessary action be taken to prepare a statement of general average in order that the responsibility of the various parties concerned may be determined" (fol. 10).

On August 28, 1922 petitioner answered this communication, stating that "the preparation of the adjustment will receive our early attention."

Attached to respondent's letter to the petitioner of August 22, 1922 was a letter from the Acting Judge Advocate General of the United States to the Quartermaster General of the United States dated July 21, 1922 and having reference to the claim of the marine underwriters for contribution in general average, which letter stated, *inter alia*, as follows:

"3. The claim being a valid one, it is therefore recommended that prompt steps be taken to ascertain the amount due the insurance company by way of contribution in gen- [fol. 4] eral average. For this purpose it is recommended that the matter be referred to a general average adjuster. Such procedure appears to have been outlined in the 6th paragraph of the 3rd indorsement of September 22, 1919, from this officer to the Chief of Transportation Service, Purchase, Storage, and Traffic Division of the General Staff. While that recommendation was made for the purpose of ascertaining whether or not a question of general

average was presented, that fact has now been determined and the same procedure is necessary in order to ascertain the amount due the insurance company, and the preparation of the general average statement.

* * * * * * *

"For the Acting Judge Advocate General.

"(S.) Sherman Moreland, Sherman Moreland, Colonel, Judge Advocate, Chief Administrative Law Division" (fol. 10 & 11).

Pursuant to the instructions received in the letter of August 22, 1922 petitioner made the customary investigation of the facts concerning the fire on the United States Army Transport "Logan", and prepared the usual general average statement dated December 31, 1926. On or about [fol. 5] January 5, 1927 the petitioner forwarded copies of this statement to the general superintendent, United States Army Transport Service, San Francisco, California.

At the time the general average statement was sent by the petitioner to the general superintendent, United States Army Transport Service, at San Francisco, California, petitioner also sent to the respondent a bill which included the following items:

Plaintiff's charge for its services in the matter	$2,250.00
Pillsbury & Curtis, for valuing vessel	50.00
Telegrams	3.12
Dakin Publishing Co., for printing general average statement	62.00

The charge of $2,250.00 is the usual, customary and reasonable charge of an average adjuster for services of this kind, and the disbursements set forth in the bill were actually made by the petitioner (fol. 11).

Thereafter, in May, 1928, the Comptroller General advised the petitioner that its claim as set forth in the bill referred to in the preceding paragraph was disallowed, but that he would recommend to Congress an appropriation of $115.12 be made in payment of the claim (fol. 11). This was the amount of petitioner's out of pocket disbursements.

The petitioner has received no payment of any kind for its services or disbursements in connection with the preparation of the general average statement.

[fol. 6] The Court of Claims held that under the facts outlined above the United States was not obligated to contribute in general average and, therefore, that no one could have any authority to contract in its behalf for a statement of general average (fol. 15).

Holding of the Court Below

The Court of Claims held:

A. That there was no general average involved in putting out the fire because there was no express contract between the shipowner and cargo owner which provided for general average (fol. 13, last par.).

B. That there could be no general average involved because the cargo was being carried by the "Logan" free of charge (fol. 13, last par.). The Court thought that the payment of freight was a prerequisite to the creation of a general average situation.

C. That the Government had no interest in the statement of general average. This holding was based on the erroneous ground that the Government was not liable to contribute for the sacrifice of the cargo which saved the whole adventure and consequently that no one could have any authority from the Government to contract for a statement of general average in which the Government had no interest (fol. 15, par. 3).

[fol. 7] D. That the Government was not obligated to pay for the adjustment of general average which it received from the plaintiff and retained, even though as owner of the "Logan" it was under a legal obligation to have such a statement prepared (fol. 16, last par.).

Questions Presented

1. Whether the obligation to contribute in general average and the right to receive general average contribution arises from a special contract or out of the general maritime law that all interests benefited by a voluntary sacrifice in time of mutual peril, whether ship or cargo, must contribute equitably to the cost of saving ship and cargo. See Mr. Justice Stone's opinion in Charter Shipping Co. v. Bowring, 281 U. S. 515.

2. Whether the fact that cargo is being carried without payment of freight operates to extinguish the long established rule of maritime law that a ship must contribute in general average in the event of a voluntary sacrifice of cargo, and the cargo to the ship, if the ship has made sacrifices for mutual benefit.

3. Whether the administrative officer of the Army Transport Service was without authority to contract for a statement of general average because the Court below held [fol. 8] (erroneously) that the Government was not interested in general average.

4. Whether the Government as a shipowner which was under a legal obligation to have prepared an adjustment of general average, was obligated to pay to the petitioner the fair value of such an adjustment which it received from the petitioner and retained. Ralli v. Troop, 157 U. S. 386.

Reasons for Granting Writ of Certiorari

1. The decision of the Court of Claims that the obligation to contribute in general average and the right to receive general average contributions arises out of a special contract between the shipowner and the cargo owner and does not arise out of general maritime law is in conflict with the decisions of the Supreme Court of The United States and with all English authorities.

Charter Shipping Company v. Bowring, 281 U. S. 515.

Ralli v. Troop, 157 U. S. 386.

Hobson v. Lord, 92 U. S. 397.

Barnard v. Adams, 10 How. 270, 303.

The Eagle, 8 Wall. 15, 23.

Carver on Carriage of Goods by Sea, 7th Ed. page 513.

[fol. 9] Duckworth on Marine Law, 3rd Ed. page 186.

Lowndes' General Average, 6th Ed. page 32, 53.

Arnould on Marine Insurance, (11th Ed.) Vol. II, sec. 908, note (g).

Milburn v. Jamaica Fruit, etc., Company (1900), 2 Q. B. 540, 550.

2. A fundamental point of maritime law in relation to general average is presented which is of great importance

to commercial and shipping interests and to the Government as well. This particular case on the decision below operates in favor of the Government. The situation, however, might equally well be reversed and a Government vessel might be seeking contribution from cargo because of sacrifices made by the ship. In such a case a Government ship which made heavy sacrifices for cargo's benefit could recover nothing.

3. The Government, as owner of the "Logan", was under a legal obligation to have prepared an adjustment of general average (Ralli v. Troop, 157 U. S. 386). Therefore, the decision of the Court of Claims in holding that the Government was under no obligation to pay to the petitioner the fair value of the general average statement which it ordered and received from the petitioner [fol. 10] and retained is in conflict with the decisions of this Court. Clark v. United States, 95 U. S. 539, 543; Crocker v. United States, 240 U. S. 74, 81.

4. The decision of the Court of Claims introduces an unfortunate conflict of authority on an important point in the law of general average, which has hitherto been uniform in this country and in England.

Respectfully submitted.

Johnson & Higgins of California, by Cletus Keating, Counsel for Petitioner.

New York, June 17, 1932.

[fols. a & 1] In Court of Claims of the United States

No. K-89

Johnson & Higgins of California, Claimant,

against

The United States

I. Petition—Filed March 22, 1929

To the Honorable the Chief Justice and the Judges of the Court of Claims of the United States:

The petition of Johnson & Higgins of California respectfully alleges on information and belief as follows:

First. The claimant, Johnson & Higgins of California, is a corporation duly organized and existing under the laws of the State of California, with an office and place of business at No. 311 California Street, San Francisco, California, and is duly authorized to conduct the business of Average Adjusters and Insurance Brokers.

Second. On information and belief, at all the times hereinafter mentioned, the defendant, the United States, was the owner of and operating and in control of the United States Army Transport Logan.

Third. On or about the 5th day of December, 1918, the said Transport Logan sailed from the Port of San Fran- [fol. 2] cisco, California, bound for Manila, Philippine Island, with cargo aboard belonging to various owners.

Fourth. On or about December 16, 1918, and again on or about December 22, 1918, fire broke out in the hold of the Transport Logan while the said vessel was at sea in the Pacific Ocean, creating a situation of imminent peril to ship and cargo. In the interests of all concerned, the Master caused water to be poured into the hold for the purpose of extinguishing the said fire and to prevent a total loss of vessel and cargo. The fire was thereby extinguished, but the cargo was badly damaged by reason of contact with the water. Thereafter, upon arrival of the Transport Logan at Manila, Philippine Islands, her cargo was discharged at that port.

Fifth. By reason of the premises, the United States, as owner of the Logan, became obligated to have made an adjustment of the general average arising out of the voluntary act of the Master set forth hereinabove.

Sixth. On or about July 21, 1922, the Acting Judge Advocate General of the United States recommended that the matter be referred to an Average Adjuster, and thereafter on or about August 22, 1922, Johnson & Higgins received written instructions from the General Superintendent, United States Army Transport Service, to prepare a statement of general average arising out of the above matter. A copy of these instructions is attached hereto and made a part hereof, marked Schedule "A".

Seventh. Accordingly, pursuant to the aforesaid instructions, the claimant secured the necessary information, duly

[fol. 3] prepared a correct and proper general average statement dated December 31, 1926, and on or about January 5, 1927, forwarded copies of the same to the General Superintendent, United States Army Transport Service, at San Francisco, Cal.

Eighth. The fair and just value of claimant's services in the premises amounted to $2,250. Necessary disbursements amounted to $115.12, a total of $2,365.12. Payment of this amount has been duly demanded by the claimant of the defendant.

Ninth. Thereafter and on or about May 22, 1928, the claimant received notification from the General Accounting Office that the entire claim had been disallowed. A copy of this notification is attached hereto and made a part hereof, marked Exhibit "B".

Tenth. Thereafter claimant made application to the General Accounting Office for a review of the disallowance of said claim, and for the allowance of the claim as a valid debt and obligation of the defendant herein. On or about November 27, 1928, the Comptroller General of the United States notified the claimant that the claim for the claimant's services as aforesaid, in the amount of $2,250, was rejected, and that a recommendation would be made to Congress that an appropriation of $115.12 be made in payment of claimant's disbursements. A copy of this notification is attached hereto and made a part hereof marked Schedule "C".

Eleventh. No part of the aforesaid sum of $2,365.12 has been paid, and this amount is wholly due and owing from [fol. 4] the defendant to the claimant, and the claimant is justly entitled to the said amount after allowing all just credits and offsets.

Twelfth. The claimant is a citizen of the United States, and has at all times borne true and faithful allegiance to the Government of the United States, and neither it nor any of its officers have in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government. The claimant owns the claim sued upon, and no transfer or assignment thereof or any part thereof or interest therein has been made. No action upon the said

claim has been taken in Congress or by any department of the Government or in any court except as hereinabove set forth. Claimant believes the facts herein stated to be true.

Wherefore claimant prays for process and judgment against the United States, in favor of the claimant, for the sum of $2,365.12, with interest thereon from the 31st day of December, 1926, as just compensation in respect of the matters hereinabove alleged, together with the costs of this suit, and the claimant prays that right and justice may be done in the premises according to the laws of the United States and the rules and practice of this Honorable Court.

Johnson & Higgins of California, by John A. Bishop, First Vice-President. Cletus Keating, Attorney for Claimant, 27 William St., New York, N. Y.

[fol. 5] *Duly sworn to by John A. Bishop. Jurat omitted in printing.*

[fol. 6] SCHEDULE "A" TO PETITION

Copy

War Department

Zone General Supply Dept., Fort Mason, San Francisco, Cal.

Office of General Superintendent

Army Transport Service

WFK:LD.

Fort Mason, Calif., Aug. 22, 1922.

Subject: Preparation of General Average Statement.

To Johnson & Higgins, Average Adjusters, 433 California St., San Francisco, Calif.:

1. Enclosed is file of papers having reference to loss of cargo shipped from San Francisco to Vladivostok and Manila on the United States Army Transport "Logan",

voyage leaving San Francisco December 5th, 1918, the loss being caused by fire which occurred in the hold of the ship on December 16th and 17th, 1918.

2. It is requested that the necessary action be taken to prepare a statement of general average in order that the responsibility of the various parties concerned may be determined.

For the General Superintendent.
(Signed) Hugh Williams. Hugh Williams, Captain, Q. M. C., Administrative Officer, A. T. S.

2 encls.
Proceedings Survey Board.
File of correspondence.

[fol. 7] SCHEDULE "B" TO PETITION

Notice of Disallowance of Claim

Civil

General Accounting Office, Claims Division

Claim No. 03399(19).
Washington, D. C., May 22, 1928.

Johnson & Higgins, 311 California Street, San Francisco, California:

Your claim(s) for $2,365.12 for costs and services rendered in preparing claims for allowance in General Average, obtaining contributory values, etc., in connection with fires which occurred on the U. S. A. T. "Logan" in December, 1919, has (have) been examined and disallowed, per the above certificate number, for the following reasons:

At the time of the fire all cargo and supplies aboard the U. S. A. T. "Logan", were the property of the United States and there could have been no liability on the Government for general average contribution. Therefore there being no necessity for preparing claims for allowance in

General Average the officer (General Superintendent, A. T. S.) was without authority to contract for such service.

J. R. McCarl, Comptroller General, by (Signed) Orlando F. Syker.

[fol. 8] SCHEDULE "C" TO PETITION

Comptroller General of the United States, Washington

A-23372.

Nov. 17, 1928.

Johnson & Higgins, 311 California Street, San Francisco, Calif.

SIRS: There has been received your letter of September 5, 1928, inquiring as to the status of your claim for $2,365.12 in connection with an attempted general average adjustment in the case of the U. S. A. T. Logan, and in reply thereto you are advised that, pursuant to Public No. 247, April 10, 1928, I have concluded to recommend to the Congress at its next session that an appropriation of $115.12 be made in payment of your claim.

The items aggregating $115.12 appear to represent your out-of-pocket expenditure in connection with this purported general average adjustment. There was no authority for making the adjustment and it conferred no benefits whatever on the United States. I am unable to recommend payment of your claim for $2,250 for your services in connection therewith.

If the Congress should approve the recommendation for the payment of any sum to you, you will then be notified by this office with respect thereto without further action or inquiry on your part.

Respectfully, (Signed) J. R. McCarl, Comptroller General of the United States.

[fol. 9] II. GENERAL TRAVERSE—Filed May 1, 1929.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant

herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. History of Proceedings

On January 12, 1931, this case was submitted on merits, without argument, on stipulation of parties, by Mr. Cletus Keating, for plaintiff, and Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

On May 4, 1931, the court filed an order remanding the case to the General Docket and referring case back to Commissioner Myron M. Cohen for report.

On August 26, 1931, an agreed statement of facts was filed by the parties.

On March 7, 1932, the case was re-submitted on merits, without argument, by Mr. Cletus Keating, for plaintiff, and by Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

[fol. 10] IV. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Green, J.**—Filed April 4, 1932

Mr. Cletus Keating for plaintiff. Mr. Staunton Williams was on the brief.

Mr. R. L. MacCutcheon, with whom was Mr. Assistant Attorney General Charles B. Rugg, for defendant. Mr. J. Frank Staley was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special Findings of Fact

Plaintiff is a corporation doing business as average adjusters and insurance brokers.

On or about December 16, 1918, fire broke out on the U. S. Army Transport Logan bound from San Francisco to Manila with a general cargo aboard, belonging to various

owners. The Logan was under the operation, management, and control of the defendant. The fire was extinguished by the officers and crew and the vessel and some of the cargo thus saved from destruction. A portion of the cargo, however, was damaged by the water with which the fire was extinguished.

Some or all of the cargo aboard the U. S. Army Transport Logan at the time of the fire was covered by insurance against general average losses.

On August 22, 1922, Hugh Williams, captain, Q. M. C., and administrative officer, A. T. S., wrote plaintiff with reference to preparing a general average statement, enclosing papers with reference to the fire mentioned above, and requesting "that the necessary action be taken to prepare a statement of general average in order that the responsibility of the various parties concerned may be determined."

On August 28, 1922, plaintiff answered this communication stating that "the preparation of the adjustment will receive our early attention."

Attached to defendant's letter to the plaintiff of August 22, 1922, was a letter from the Acting Judge Advocate General of the United States to the Quartermaster General of the United States dated July 21, 1922, and having reference [fol. 11] to the claim of the marine underwriters for contribution in general average, which letter stated, inter alia, as follows:

"3. The claim being a valid one, it is therefore recommended that prompt steps be taken to ascertain the amount due the insurance company by way of contribution in general average. For this purpose it is recommended that the matter be referred to a general average adjuster. Such procedure appears to have been outlined in the 6th paragraph of the 3rd indorsement of September 22, 1919, from this office to the Chief of Transportation Service, Purchase, Storage, and Traffic Division of the General Staff. While that recommendation was made for the purpose of ascertaining whether or not a question of general average was presented, that fact has now been determined and the same procedure is necessary in order to ascertain the amount due the insurance company, and the preparation of the general average statement.

* * * * * * *

"For the Acting Judge Advocate General.

"(S.) Sherman Moreland, Sherman Moreland, Colonel, Judge Advocate, Chief, Administrative Law Division."

Pursuant to the instructions received in the letter of August 22, 1922, plaintiff made a thorough investigation of the facts concerning the fire on the U. S. A. T. Logan, and prepared the usual general average statement dated December 31, 1926. On or about January 5, 1927, the plaintiff forwarded copies of this statement to the general superintendent, United States Army Transport Service, San Francisco, California.

At the time the general average statement was sent by the plaintiff to the general superintendent, U. S. Army Transport Service, at San Francisco, California, plaintiff also sent the defendant a bill which included the following items:

Plaintiff's charge for its services in the matter	$2,250.00
Pillsbury & Curtis, for valuing vessel	50.00
Telegrams	3.12
Dakin Publishing Co., for printing general average statement	62.00

The charge of $2,250 is the usual, customary, and reasonable charge of an average adjuster for services of this kind, and the disbursements set forth in the bill were actually made by the plaintiff.

About May 22, 1928, the plaintiff was advised by the Comptroller General that its claim as set forth in the bill referred to in the preceding paragraph was disallowed, and about May 28, 1928, the plaintiff wrote a letter to the Comptroller General setting forth more particularly the nature of its claim and referring to the letter signed by Hugh Williams, captain, Q. M. C., and administrative officer, A. T. S., requesting that a statement of general average be prepared. Subsequently the Comptroller General advised the plaintiff that he would recommend to Congress an appropriation of $115.12 be made in payment of the claim.

The cargo of the said transport Logan consisted in part of supplies for the American expeditionary forces in Siberia, supplies for the American troops in the Philippine

[fol. 12] Islands, supplies belonging to the government of the Philippine Islands, and supplies belonging to the American Red Cross, together with a small amount of personal property of a commissioned officer and of a warrant officer of the United States Army. All of said cargo was being transported or carried on said vesel free of charge.

No payment by way of contribution in general average has been made by the United States.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is therefore ordered that its petition be dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion

Green, Judge, delivered the opinion of the court:

Plaintiff brings this suit to recover $2,365.12 for services rendered and disbursements made in connection with a general average statement which plaintiff prepared at the request of the administrative officer of the United States Army Transport Service. The defense set up is that the evidence fails to show that the officer who directed the statement to be made had any authority to enter into a contract for that purpose.

It appears without dispute from the evidence that about August 22, 1922, the general superintendent and administrative officer of the United States Army Transport Service wrote to the plaintiff instructing it to prepare a statement of general average arising out of the damage done by fire to the cargo of the United States Army transport Logan, bound from San Francisco to Manila. The Logan was under the operation, management, and control of the defendant, and had a general cargo aboard belonging to various owners which was being transported free of charge. There is no evidence, however, that the Government had in

any way obligated itself to transport this cargo, or any part of it, or had made any contract of any kind with reference to it. Some or all of this cargo was covered by insurance against general average losses. The fire was extinguished by pouring water into the hold, and as a consequence a portion of the cargo was damaged by water or fire. Under this situation, Captain Hugh Williams, administrative officer of the Army Transport Service, wrote plaintiff enclosing a file of papers with reference to the loss of the cargo by the fire to which reference has been made, and requested that a statement of general average be prepared in order that the responsibility of the various parties concerned might be determined. The plaintiff responded in effect that the matter would be promptly attended to. It prepared a general average statement and rendered a bill for $2,250 for its services in the matter and $115.12 for disbursements connected therewith. The evidence shows that the charge made for preparing the statement was a reasonable one, and the disbursements necessary and proper in connection with its preparation.

[fol. 13] The plaintiff contends that the case is one to which it is proper to apply the maritime rule of general average, that it was the duty of the Government to have a general average statement prepared, and that the action of the officer of the Army Transport Service in requesting plaintiff to prepare such a statement made the Government liable for payment of plaintiff's services. These contentions are disputed by defendant and present the issues in the case.

It is not necessary for us to determine whether the case presents facts for the application of the rule of general average as between the owners of the cargo. The underlying question in the case is whether the Government can be made liable under the principles of general average, and it will be observed in this connection that the statement for a general average was requested on account of the claim of the underwriters for a contribution. The evidence does not show the precise nature of this claim, but the only purpose that the underwriters could have had in asking for the statement would be to make it the basis of a claim that the Government should contribute towards payment of the losses on the cargo. So also it is obvious that unless the defendant could be held liable for contribution on account

of the losses to the cargo, or might compel the cargo owners to contribute to the loss sustained by the vessel, the Government had no interest in having a general average statement made. The ultimate point to be determined is whether all of the losses caused by the fire would, under the circumstances of the case, be apportioned to both the ship and the cargo under the rule of general average. If the ship was not liable for contribution, the Government had no need for a statement of general average. In determining whether the principles of general average can be applied against the defendant in the case before us it becomes necessary that we should consider the origin and basis of the rule.

General average is defined to be a contribution by the several interests engaged in a maritime adventure to make good the loss of one of them, for voluntary sacrifices of a part of the ship or cargo, to save the residue of the property or the lives of those on board from an impending peril. 36 Cyc. p. 372, A. The principle of contribution in general average is of very ancient origin, derived from the Rhodian law and applied by the inhabitants of the island of Rhodes who were noted in that day as mariners, centuries before the Christian era. The Romans adopted it and it eventually became a part of English law, and we in this country received it along with the common law of Great Britain. Some authorities assert that it depends on natural justice and equity arising out of the relation of the parties, while others hold that it arises out of a contract of affreightment and that the obligation to contribute is implied by law. Ordinarily when a ship carrying cargo, or on which it has been loaded, takes fire, and in extinguishing the fire the cargo is damaged to a greater or less extent, the rule of general average will apply, but the case at bar is a very exceptional one which, we think, takes it out of the general rule. So exceptional is the case that we can find no precedents to guide us, but must consider the foundation of the rule of general average and determine whether the reasons given for establishing it have any application to the instant case.

The case at bar differs from any other in which we are able to find that the rule of general average has been ap- [fol. 14] plied in that the cargo was being carried free. The defendant made no contract with reference to it, nor, as we think, can any be implied. The acts of the defendant

with reference to the cargo were merely permissive. The vessel was bound from San Francisco to Manila. The defendant permitted the cargo owners to place their cargo on board, but neither contracted to transport it nor to guard it. It was not in the situation of the owner of a vessel that takes any cargo offered for hire and therefore becomes subject to the rules pertaining to a common carrier, nor did it become a bailee for hire as when a vessel is chartered to carry a special cargo. It was very much in the position of the owner of a building who permitted another party to place goods therein, and in such case assumed no responsibility for theft or fire, or the consequences of a fire in the way of water damaging the goods.

When we consider this situation in connection with the theory and reasoning upon which the principles of general average are based, all reasons for applying it to the case against the defendant, as we think, disappear.

In the first place, general average is applied only in cases of joint adventure; that is, the parties must have a common purpose, in part at least. It is well known that among the ancients, and even down to a comparatively late date, it was quite common that arrangements should be made for a voyage in which captain, crew, and cargo owners shared in the profits which might be made, and this practice to some extent is still followed, more particularly in fishing fleets. But even where the cargo is carried for hire, both the owner of the vessel and the owner of the cargo have a common purpose and are engaged in the joint enterprise of having the cargo conveyed and landed at the point of destination, and, what is still more important, the owner of the vessel is paid therefor. This payment is not merely for the conveyance of the cargo, but for taking charge of it as well, and the owner of the vessel becomes responsible for its delivery at destination subject to certain exceptions not necessary to mention here. But in the instant case there was no common purpose, no joint enterprise or adventure in which defendant was concerned. Under the circumstances of the case at bar, we think no one would contend but that if the Government, after the cargo had been loaded and while the vessel still lay at the wharf, had concluded that it wanted to send the vessel in a different direction and to a different port, it would have the right to do so, and could have told

the owners of the cargo to unload it, and if they did not, could itself have taken the cargo out of the vessel and put it on the wharf. But if there had been a common adventure, it would have had no right to do this, for all of the parties thereto would be bound to perform their respective obligations incurred by reason of having entered upon it, and one of these obligations would of necessity have been the carrying of the cargo to the port of destination. This of itself, we think, shows conclusively that there was no common adventure.

In Ralli v. Troop, 157 U. S. 386, the principle that there must be a common adventure is emphasized over and over again, and it was said by the court:

"Three important decisions in the courts of the United States directly support the position that, in order to give a right to contribution in general average, the sacrifice must have been made for the safety of the common adventure, * * *."

[fol. 15] The right to general average where there is a common adventure is well supported by equitable principles. No good reason can be given why parties that engage in a joint enterprise should not share proportionately in losses which unavoidably result in attempting to carry out the joint adventure, and especially is it just that where the owner of the vessel is being paid to transport the cargo and is responsible for the care of the cargo, he should be subject to the rule of general average, if the cargo is injured in saving the ship. But in the case at bar the Government owed no duty to the owners of the cargo, except the duty not to injure it through negligence, of which there is no evidence and with which we would not be concerned in any event. What good reason can be given why the Government should be mulcted in damages (being guilty of no negligence) because it permitted the cargo owners to use part of the space on its vessel? We think it would be a new principle of law to permit a liability to rise solely and alone from a free or charitable act done in the first instance for the accommodation of the party seeking to recover damages. We conclude that the principle of general average does not apply to the Government in this case.

We do not overlook the decisions cited by plaintiff to sustain its position that the Government is liable herein. Our holding is not that the Government under no circumstances would be subject to the rules of general average, but that the case at bar is an exceptional one. The plaintiff cites a number of cases in support of its contention that the Government is liable for a general-average contribution to the same extent as a private individual. No doubt it is where it ships goods under a contract of affreightment, or charters a vessel to have its goods transported, and that is all that these cases hold. In such cases the Government is paying the vessel owner to carry the goods and take charge of them. It is engaged with the vessel owner and the owners of the remainder of the cargo in the common adventure and joint enterprise of having the cargo transported by the ship to its destination. But in the case at bar these essential elements do not appear, and the cases cited are not an authority for the position taken by plaintiff.

If we are correct in what is stated above, it follows that the Government had no interest in the statement of general average, because it would not in any event be liable to contribute for the loss on the cargo. Consequently no one could have any authority to contract for a statement of general average.

While counsel for defendant deny that the facts before the court present a case to which the rules of general average would apply as against the Government, they rest their case largely on the contention that Captain Williams, who was the administrative officer of the Army Transport Service, had in any event no authority to order a statement of general average to be made, and the question thus arising must also be considered.

The authority of Government officials to make a contract on behalf of the Government is never presumed but must be shown to exist through some constitutional or statutory provision, although it may be implied therefrom or from the nature of the duties of a Government official occupying an office lawfully created. It may be conceded for the purposes of the case that as administrative officer of the Army Transport Service, Captain Williams had the authority to do [fol. 16] whatever was needful for the transportation of the defendant's troops, together with their equipment and sup-

plies so far as they belonged to the Government. The nature of his duties as such officer would imply such authority. But it is quite clear that he had no authority to contract for the transportation of cargo owned by other parties; and equally clear, as we think, that he had no authority to make the Government liable for contribution in case of injury to a cargo permitted to be on the Government transport, when the injury was caused by efforts made to preserve the vessel and cargo; and there is no evidence that he intended to do so when the cargo was placed on board the Government vessel. There is no evidence as to who, if anyone, gave permission for the cargo to be on the vessel, although it should be said in this connection that we do not think this would be material if it had been shown. Indeed, there is no evidence in the case as to just how the cargo came to be upon the Government vessel.

The only matter to which plaintiff calls our attention as showing that Captain Williams had authority to contract for such services is the fact that the Acting Judge Advocate General and Chief of the Administrative Law Division wrote a letter to the Quartermaster General of the United States, dated July 21, 1922, with reference to the claim of the marine underwriters for a contribution in general average, which letter stated, among other things, that—

"The claim being a valid one, it is therefore recommended that prompt steps be taken to ascertain the amount due the insurance company by way of contribution in general average. For this purpose it is recommended that the matter be referred to a general average adjuster."

The letter further stated in substance that such procedure was necessary in order to ascertain the amount due the insurance company.

It may be inferred from the opinion of the Judge Advocate General that the defendant might be liable for contribution to the insurance companies on account of losses to the cargo. While the Judge Advocate General was acting within the scope of his duties in rendering the opinion, he could not authorize a contract with reference to a general average statement, or, in other words, could not create authority where it did not exist. Moreover, the opinion does not hold that Captain Williams had authority to make

the contract in question, and if it did, the utmost that we can say with reference to it is that it is entitled to respectful consideration.

As we have in effect held that the administrative officer of the Army Transport Service had no authority to bind the Government to make a contribution either to the owners of the cargo or to the insurance companies, and that there was no implied obligation, it may appear to be superfluous to add that even if it was the duty of the Government, as owner of the vessel, to furnish a statement of general average our attention has not been called to any statutory provision, or any implication therefrom, which would authorize any person to bind the Government to pay for a statement of general average. It may possibly be asked, If Captain Williams did not have this authority, who did? But it is not necessary for us to determine whether anyone had such authority, for it does not follow that even if a duty was cast upon the Government to furnish a general average statement, any official had been given authority to [fol. 17] order one made. It is only necessary that we should determine whether Captain Williams had such authority, and we find nothing in the nature of his position from which it might be implied even if the duty was cast upon the defendant to have one made. In this connection it should be noted that the preparation of the statement for general average was not for the benefit of the Government, but for the benefit of those who had insured the cargo. No claim is made that if the statement had not been ordered a liability would have been created against the Government. The only case cited in this connection, where those who prepared a general average statement were held entitled to recover the cost of preparing such statement, is that of Coast Wrecking Co. v. Phoenix Insurance Co., 13 Fed. 127. This is a case in which a bond had been given for the expenses connected with the establishment of liabilities under the rule of general average, and a libel had been filed upon the vessel. The questions involved in the case were altogether different from those in the case at bar and it furnishes no authority in support of plaintiff's position.

It follows from what has been stated that plaintiff's petition must be dismissed and it is so ordered.

Whaley, Judge; Williams, Judge; Littleton, Judge; and Booth, Chief Justice, concur.

[fol. 18] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 4th day of April, A. D., 1932, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is therefore ordered that the petition be dismissed.

[fol. 19] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 36,863. Court of Claims. Term No. 166. Johnson & Higgins of California, petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed June 21, 1932. File No. 36,863.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED

Supreme Court

OCT

No. 7[illegible]

JOHNSON & RIGGINS OF CALIFORNIA,

Petitioner,

vs.

THE UNITED STATES.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

CLETUS KEATING,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1932

No. 166.

JOHNSON & HIGGINS OF CALIFORNIA,
Petitioner,
against
THE UNITED STATES.

BRIEF FOR THE PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petitioner seeks a review of the judgment of the Court of Claims (fol. 18) in favor of the defendant dismissing the petition.

The facts are outlined in the petition for writ of certiorari (fol. 2 to fol. 5).

FIRST POINT.

THE DECISION OF THE COURT OF CLAIMS THAT THE OBLIGATION TO CONTRIBUTE IN GENERAL AVERAGE MUST ARISE OUT OF A SPECIAL CONTRACT BETWEEN THE SHIPOWNER AND THE CARGO OWNER IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND ALL AUTHORITIES IN ENGLAND.

A: *The nature of general average contribution.*

This Court concisely defined general average in the *Star of Hope*, 9 Wall. 203 (at page 228) as follows:

> "General average contribution is defined to be a contribution by all the parties in a sea adventure

to make good the loss sustained by one of their number on account of sacrifies voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. * * *

"Common justice dictates that where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger or incurs extraordinary expenses to promote the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure.

"Where expenses are incurred or sacrifices made on account of the ship, freight, and cargo, by the owner of either, the owners of the other interests are bound to make contribution in the proportion of the value of their several interests, * * *."

* * * * * *

"Such claims have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit of the associated interest shall be made good by all the interests which were exposed to the common peril and which were saved from the common danger by the sacrifice."

In the case of *Ralli* v. *Troop,* 157 U. S. 386 (at page 411), this Court said:

"In this country when a ship is on fire, damage caused to goods in the hold by water either poured down from above or let in by scuttling the ship by the master or under his order or direction for the

> purpose of saving ship and cargo has long been considered a subject of general average."

This is precisely the situation presented in the case at bar in which a portion of the cargo was damaged by water with which the fire on the LOGAN was extinguished under the direction of the master, thus saving the ship and the balance of the cargo.

The Court of Claims, however, taking up a point that was not considered by either the petitioner or the respondent in their respective briefs, held that no general average situation was presented in this case because of the fact that no freight was paid for the carriage of the cargo in question. This decision of the Court of Claims is based upon a complete misconception of the nature of general average, and conflicts with all the authorities on this subject.

B: *The decision of the Court of Claims is in conflict with the decisions of this Court.*

The Court of Claims held that the United States was not liable to contribute in general average because there was no contract for payment of freight between it as owner of the LOGAN and the cargo owners and, therefore, that the United States had no interest in the preparation of a general average statement and was not obligated to pay for one. This is in conflict with decisions of this Court which have reiterated time and again that the liability of a shipowner or cargo owner to contribute in general average arises not from any express contract, but out of the general maritime law and is based on equity.

In *Charter Shipping Company* v. *Bowring*, 281 U. S. 515, 517, Mr. Justice Stone, referring to liability to contribute in general average, said:

> "*As that liability arises not from contract* but from participation in the common venture its extent in the absence of such limiting clauses is under the admiralty rule fixed by the law of the port of destination." (Italics ours.)

In the leading case of *Ralli* v. *Troop*, 157 U. S. 386, at 397 this Court said:

> "As the right to general average may be considered as resting not merely on implied contract between the parties to the common adventure but rather on the established law of the sea in the light of a special duty which all owners of ships and cargoes undertake in maritime adventures * * *"

and again at page 418:

> "The law of general average is part of the maritime law and not of the municipal law and applies to maritime adventures only."

In the same opinion at page 396, quoting from the case of *Burton* v. *English*, 12 Q. B. D. 218:

> " 'By what law does the right arise to general average contribution? I do not think that it forms any part of the contract to carry; and that it does not arise from any contract at all but from the old Rhodian laws and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract but in consequence of a common danger where natural justice required that all should contribute to indemnify for the loss

> of property which is sacrificed by one in order that the whole adventure may be saved.' "

In *The Eagle*, 8 Wall. 15, this court was discussing an objection to jurisdiction on the ground that the case was not brought within the requirements of the Act of 1845. In this connection it was said at page 23 of the opinion:

> "We think it also a matter of grave doubt if the Act confers jurisdiction in cases of salvage, jettison or general average. These are not matters of contract according to the most eminent commentators on the subject and they certainly are not cases of tort."

See also *Hobson* v. *Lord*, 92 U. S. 397; *Barnard* v. *Adams*, 10 How. 270, 303.

It is clear that the decision of the Court of Claims holding that there was no obligation to contribute in general average in the case at bar because of the absence of an express contract for payment of freight between the owner of the LOGAN and the cargo owners completely disregards the decisions of this Court on the subject.

C: *The decision of the Court of Claims is in conflict with all English authorities.*

The English Courts and text writers uniformly state that general average arises from the general maritime law and is not dependent on any contract.

In *Carver on the Carriage of Goods by Sea*, 7th Ed., page 513, it is said:

> "Brett, L. J. in *Burton* v. *English*, said: '*I do not think that it (the right to contribute) forms*

> ***any part of the contract to carry and that it does not arise from any contract at all*** but from old Rhodian laws and has become incorporated into the law of England as the law of the ocean. ***It is not as a matter of contract but in consequence of a common danger*** where naturally justice requires that all should contribute to indemnify the loss of property which is sacrificed by one in order that the whole adventure may be saved.'" (Italics ours.)

Similarly in *Lowndes' General Average*, 6th Ed. page 32, the following statement appears:

> "*The liability to contribute in no sense results from the contract of carriage but exists wholly independently of the contract* of carriage by virtue of the equitable doctrine of the Rhodian law which as part of the law maritime has been incorporated in the municipal law of England." (Italics ours.)

Duckworth on Marine Law, 3rd Ed. states as follows at page 186:

> "It was once suggested that liability to pay a general average contribution was based upon an implied contract; but it is now generally accepted that it is an integral part of maritime law and so became incorporated in the law of this country. It is to be borne in mind that the right to claim average contribution is a purely maritime law and that nothing in any way resembling it is sanctioned by authority in relation to land contracts or to circumstances happening on land."

Arnould on Marine Insurance and General Average (11th Ed.) Vol. II, in note (g) to Section 908, says:

> "The view best supported by judicial authority in this country is that the right arises not out of contract but from the old Rhodian laws and has thence become incorporated into the laws of England as the law of the ocean."

In *Milburn* v. *Jamaica Fruit etc. Co.* (1900) 2 Q. B. 540, Vaughan Williams, L. J., said at page 550:

> "The liability to contribute in no sense results from the contract of carriage but exists wholly by virtue of the equitable doctrine of the Rhodian law which as part of the law maritime has been incorporated in the municipal law of England."

The Court of Claims has based its decision that no general average situation was involved in this case on the assumption that as no freight was paid by the owners of the cargo, no duty was owed the cargo by the vessel. The fallacy of this position is apparent. It is directly contrary to the fundamental concept of general average. *The various cargo owners owe one another no duty whatsoever, contractual or otherwise, yet they are obliged to contribute to one another in general average under the maritime law in the event of a sacrifice by one of them for the common benefit of ship and cargo.* Carver, Carriage of Goods by Sea (7th Ed.), Sec. 364.

As the authorities cited above definitely state, the obligation to contribute and the right to receive contribution in general average arises not from a special contract but is apart from contract and arises out of maritime law. Equity imposes the duty to contribute in general average as a result of mutual participation in the same sea risk.

SECOND POINT.

A FUNDAMENTAL POINT OF MARITIME LAW IS PRESENTED WHICH IS OF GREAT IMPORTANCE TO COMMERCIAL AND SHIPPING INTERESTS AND TO THE GOVERNMENT AS WELL.

Situations involving the principal in this case are constantly arising. If the principle announced by the Court of Claims, which is in direct conflict with the established commercial law, be allowed to remain on the books, serious confusion in shipping practice will inevitably result.

Frequently ship and cargo are under common ownership. In such cases, as in the present case, no freight is paid and no contract involved, yet it has always been held that the maritime law of general average applies.

In the recent case of *Gulf Refining Company* v. *Universal Ins. Co.*, 32 Fed. (2nd) 555 (1929) the Circuit Court of Appeals for the Second Circuit said on this subject:

> "It is authoritatively settled that general average depends upon the event of a common sacrifice for the benefit of all who are or may be interested in the voyage—not upon the existence of different contributory subjects. Contribution is a consequence. Neither the absence of a cargo nor the common ownership of vessel and cargo will affect the application of the principle of general average. *Potter* v. *Ocean Ins. Company,* Fed. Cas. No. 11,335; *La Fonciere Co.* v. *Dollar,* 181 Fed. 945; *Risley* v. *Ins. Co. of North America,* 189 Fed. 529."

The same rule applies in England. See *Montgomery & Company* v. *Indemnity Mutual Marine Ins. Company, Ltd.* (1902) 1 K. B. 734, where it was held that even though ship and cargo both belonged to the same owner

(no freight being paid), the law of contribution in general average still applies.

The practical aspect of this situation arises where different underwriters have insured ship and cargo where both have the same owner, or in cases similar to the one at bar. In such cases it has never before been held that the underwriters were not entitled to receive general average contribution or were not obliged to contribute in general average as if the ownership were separate and distinct, and freight duly paid. See *Potter* v. *Ocean Ins. Company,* Fed. Cas. No. 11,335; *Montgomery & Company* v. *Indemnity Mutual Marine Ins. Company, Ltd.* (1902), 1 K. B. 734.

For example, in the case at bar a part of the cargo of the LOGAN was insured by the Atlantic Mutual Insurance Company. This underwriter now has an action pending in the United States Court of Claims to recover a general average contribution from the Government as owner of the LOGAN.

In the case at bar a portion of the cargo was sacrificed and resulted in saving the common adventure. For this reason the decision of the Court of Claims holding that no general average situation exists operates in favor of the Government which would otherwise be obligated to contribute in general average for the benefit of the cargo that was sacrificed. A contrary situation, however, is just as apt to arise, where the sacrifice is made by the Government vessel. In such a case the rule announced by the Court below in this case would prevent the Government from recovering from the cargo any general average contribution. It is obvious that no such exception to the uniform rule should be created, at least without the sanction of this Court.

THIRD POINT.

THE DECISION OF THE COURT OF CLAIMS THAT THE GOVERNMENT WAS NOT OBLIGATED TO PAY TO THE PETITIONER THE FAIR VALUE OF THE ADJUSTMENT OF GENERAL AVERAGE RECEIVED BY IT FROM THE PETITIONER IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

In the case at bar the United States, as owner of the LOGAN, was obligated to have prepared a general average statement. The duty of a vessel owner to so do was stated by this Court in the case of *Ralli* v. *Troop*, 157 U. S. 386. In that case the Court said at page 400:

> "After a voluntary sacrifice of part of the adventure, and a consequent escape of the rest from imminent peril, the owner of the ship, or in his absence the master as his agent, has the duty of having an adjustment made of the general average, * * *."

Because of the intricate problems involved in the determination of general average contribution in modern voyages in which so many varied cargo interests are concerned, the custom has grown up of engaging professional average adjusters who are familiar with the difficult problems of accounting concerned in these cases. This custom is recognized by the Courts. *Amelia S. de Perez*, 22 F. (2nd) 585. In this case the Court said:

> "From the very origin of general average it appears to have been the duty of the master as representative of the shipowners to make general average adjustment * * *. The custom has, to be sure, grown up of engaging adjusters for con-

> venience sake, who can familiarize themselves with and work out the rather difficult problems of accounting that are involved in many of these cases."

The Acting Judge Advocate General of the United States Army, recognizing that the United States as owner of the LOGAN was under obligation to have an adjustment of general average prepared, recommended to the Quartermaster General of the United States that the matter be referred to a professional general average adjuster in accordance with the recognized custom (fol. 11). Accordingly the administrative officer of the United States Army Transport Service requested the plaintiff to prepare such a general average statement. Whether or not the record in this case shows that this officer had authority to order such a statement, it is clear under the decisions of this Court that the petitioner is entitled to recover the fair value of its services in preparing the adjustment of general average for the Government.

It has been held by this court that although a contract under which services were rendered to the United States may be void, one who renders those services may be entitled to recover their fair value.

In the case of *Clark* v. *United States,* 95 U. S. 539, 543, where the Government used a vessel of the claimant under a contract that was void by reason of not being in accordance with the controlling statute, this court held that the claimant was entitled to the value of the use of the vessel during the time that it was in the hands of the Government agents.

In the case of *Crocker* v. *United States,* 240 U. S. 74, 81, this Court held that although no recovery could be had upon a contract with the Postmaster General because

it was tainted with fraud and rescinded by him on that ground, nevertheless the claimant was entitled to a recovery upon *quantum valebat.*

It is apparent that under the decisions of this Court, even if the administrative officer of the Army Transport Service were without authority to order this adjustment of general average, (which petitioner denies) the petitioner is entitled to recover its fair value upon implied contract for *quantum meruit* and that the judgment of the Court of Claims in holding to the contrary is in conflict therewith.

CONCLUSION.

The opinion of the Court of Claims places in the reports a doctrine at complete variance with established maritime law and the decisions of this Court.

Review by certiorari should be had with a view to reaffirming the holdings of this Court unheeded by the decision below.

Respectfully submitted,

CLETUS KEATING,
Counsel for Petitioner.

Supreme Court of the United States

October Term, 1941

No. 1

[illegible]

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

BRIEF FOR THE PETITIONER

CLETUS KEATING,
STAUNTON WILLIAMS,
RICHARD L. SULLIVAN,
Counsel for Petitioner.

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Even in the absence of an express contract the Government is liable for a quantum meruit of the value of Petitioner's services.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1932.

No. 166.

JOHNSON & HIGGINS OF CALIFORNIA,
Petitioner,

against

THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

BRIEF FOR THE PETITIONER.

This case comes before the Court on writ of certiorari to the Court of Claims of the United States granted on October 10, 1932.

Jurisdiction of this Court is provided by 28 U. S. C. § 288 (a) and (b).

The opinion of the Court of Claims has not yet been reported.

STATEMENT OF FACTS.

In December, 1918, the United States Army Transport "LOGAN" was on a voyage from San Francisco to Manila with general cargo consisting of supplies for the American Expeditionary Forces in Siberia, supplies for American troops in the Philippine Islands, supplies belonging to the Government of the Philippine Islands and supplies belonging to the American Red Cross, together

with a small amount of personal property of a commissioned officer and of a warrant officer of the United States Army. All of this cargo was being transported free of charge (R. 14).

The "LOGAN" was under the operation, management and control of the United States (R. 13).

During the voyage a serious fire broke out which imperilled ship and cargo and was extinguished with water by the crew. The vessel and some of the cargo was thus saved from destruction by the general average sacrifice. A portion of the cargo was damaged by the water with which the fire was extinguished. This is one of the commonest of general average cases. Some or all of the cargo aboard the United States Army Transport "LOGAN" at the time of the fire was covered by private insurance against general average losses (R. 13).

On August 22, 1922, the General Superintendent, Army Transport Service by Hugh Williams, Captain, Q. M. C., Administrative Officer, wrote Petitioner, a professional adjuster, with reference to preparing a general average statement, enclosing papers with reference to the fire mentioned above and requesting "that the necessary action be taken to prepare a statement of general average in order that the responsibility of the various parties concerned may be determined" (R. 13).

On August 28, 1922, Petitioner answered this communication, stating that "the preparation of the adjustment will receive our early attention" (R., 13).

Attached to respondent's letter to the Petitioner of August 22, 1922, was a letter from the Acting Judge Advocate General of the United States to the Quartermaster

General of the United States dated July 21, 1922, and having reference to the claim of the marine underwriters for contribution in general average, which letter stated, *inter alia,* as follows:

> "3. The claim being a valid one, it is therefore recommended that prompt steps be taken to ascertain the amount due the insurance company by way of contribution in general average. For this purpose it is recommended that the matter be referred to a general average adjuster. Such procedure appears to have been outlined in the 6th paragraph of the 3rd indorsement of September 22, 1919, from this officer to the Chief of Transportation Service, Purchase, Storage, and Traffic Division of the General Staff. While that recommendation was made for the purpose of ascertaining whether or not a question of general average was presented, that fact has now been determined and the same procedure is necessary in order to ascertain the amount due the insurance company, and the preparation of the general average statement.
>
> * * * * * * * *
>
> "For the Acting Judge Advocate General.
>
> "(s) SHERMAN MORELAND
> "SHERMAN MORELAND,
> "Colonel, Judge Advocate,
> "Chief, Administrative Law Division" (R. 13).

Pursuant to the instructions received in the letter of August 22, 1922, Petitioner made the necessary investigation concerning the fire, and prepared the usual general average statement. The Petitioner forwarded copies of this statement to the General Superintendent, United

States Army Transport Service, San Francisco, California (R. 14).

At the time the general average statement was sent by the Petitioner to the General Superintendent, United States Army Transport Service, at San Francisco, California, Petitioner also sent to the respondent a bill which included the following items:

Plaintiff's charge for its services in the matter	$2,250.00
Pillsbury & Curtis, for valuing vessel	50.00
Telegrams	3.12
Dakin Publishing Co., for printing general average statement	62.00
	$2,365.12

The charge of $2,250.00 is the usual, customary and reasonable charge of an average adjuster for services of this kind, and the disbursements set forth in the bill were actually made by the Petitioner (R. 14).

Thereafter, in May, 1928, the Comptroller General advised the Petitioner that its claim as set forth in the bill referred to in the preceding paragraph was disallowed, but that he would recommend to Congress an appropriation of $115.12 be made in payment of the claim. This was the amount of Petitioner's out of pocket disbursements (R. 14).

The Petitioner has received no payment of any kind for its services or disbursements.

The Opinion of the Court of Claims.

In dismissing the Petition the Court of Claims held:—

1. That there was no general average involved in putting out the fire because there was no express contract

between the shipowner and the cargo owner which provided for general average.

2. That there could be no general average involved because the cargo was being carried by the LOGAN free of charge; that the payment of freight was a prerequisite to the creation of a general average situation.

3. That the Government had no interest in the statement of general average. (This holding was based upon the erroneous ground that the Government was not liable to contribute for the voluntary sacrifice of the cargo which saved the common venture and consequently that no one could have any authority from the Government to contract for a statement of general average in which the Government had no interest.)

4. That the Government was not obligated to pay for the general average statement which it received from the Petitioner and retained even though as owner of the LOGAN it was under the duty to have such a statement prepared.

QUESTIONS PRESENTED.

1. Whether the obligation to contribute, and the right to receive contribution, in general average, arises from a special contract or out of the general maritime law which requires that all interests benefited by a voluntary sacrifice in time of mutual peril, must contribute equitably to the cost of saving ship and cargo.

2. Whether the fact that the cargo was being carried without payment of freight changes the usual rule.

3. Is the United States as the owner of a Public Vessel saved by a general average sacrifice excused from contributing in general average, in view of the fact that the United States has consented to be sued in cases "not sounding in tort?" 28 U. S. C. §250 (1).

4. Irrespective of the ultimate determination by this court as to the liability of the United States as the owner of a Public Vessel to contribute in general average, did the Administrative Officer of the Army Transport Service, charged with the duty of operating transports, lack authority to have a general average statement prepared, as would have been done by any prudent shipowner under like circumstances.

FIRST POINT.

THE OBLIGATION TO CONTRIBUTE IN GENERAL AVERAGE AND THE RIGHT TO RECEIVE GENERAL AVERAGE CONTRIBUTION IS A DOCTRINE OF EQUITY AND ARISES IRRESPECTIVE OF ANY CONTRACT.

A: THE NATURE OF GENERAL AVERAGE CONTRIBUTION.

This Court concisely defined general average in the *Star of Hope,* 9 Wall. 203 (at page 228), as follows:

> "General average contribution is defined to be a contribution by all the parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily

incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. * * *

"Common justice dictates that where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger or incurs extraordinary expenses to promote the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure.

"Where expenses are incurred or sacrifices made on account of the ship, freight, and cargo, by the owner of either, the owners of the other interests are bound to make contribution in the proportion of the value of their several interests, * * *."

* * * * *

"Such claims have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit of the associated interest shall be made good by all the interests which were exposed to the common peril and which were saved from the common danger by the sacrifice."

In the case of *Ralli* v. *Troop*, 157 U. S. 386 (at page 411), this Court said:

"In this country, when a ship is on fire, damage caused to goods in the hold by water, either poured down from above, or let in by scuttling the ship, by the master, or under his order or direction for the purpose of saving ship and cargo, has long been considered a subject of general average."

This is precisely the situation presented in the case at bar in which a portion of the cargo was damaged by

water with which the fire on the LOGAN was extinguished under the direction of the master, thus saving the ship and the balance of the cargo.

B: GENERAL AVERAGE DOES NOT DEPEND ON SPECIAL CONTRACT.

The obligation to contribute in general average and the right to receive general average contribution is not based upon any special contract or upon the payment of freight, but arises out of the general maritime law and is founded upon the doctrine of equity and policy that the interests sacrificed to protect the common venture should not bear the entire burden but that all the interests should share the loss or expense in equal proportion. The absence of a special contract is utterly immaterial.

In the leading case of *Ralli* v. *Troop*, 157 U. S. 386, 397, this Court said:

> "As the right to general average may be considered as resting not merely on implied contract between the parties to the common adventure, but rather on the established law of the sea, in the light of and subject to which all owners of ships and cargoes undertake maritime adventures * * *".

In *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515, 517, Mr. Justice Stone in discussing liability to contribute in general average said (italics ours):

> "*As that liability arises not from contract but from participation in the common venture,* [citing] its extent in the absence of such limiting clauses, is under the admiralty rule, fixed by the law of the port of destination."

The English authorities unanimously recognize that general average arises as a matter of equity and is in no sense dependent upon an express contract between the shipowner and cargo owner.

In *Burton* v. *English*, 12 Q. B. D. 218, Brett L. J. said:

> "• • • I do not think that it [the right to contribute] forms any part of the contract to carry and that it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved."

To the same effect are:

The Eagle, 8 Wall. 15, 23;
Hobson v. *Lord*, 92 U. S. 397;
Barnard v. *Adams*, 10 How. 270, 303;
Lowndes' General Average, 6th Ed. p. 32;
Duckworth on Marine Law, 3rd Ed. p. 186;
Arnould on Marine Insurance and General Average, 11th Ed. Vol. II, section 908 note (g);
Milburn v. *Jamaica Fruit etc. Co.* (1900) 2 Q. B. 540, 550.

The decision of the Court of Claims was based on the assumption of that Court that as no freight was paid by the owners of the cargo and no special contract entered into between the cargo owners and the vessel owner, no duty was owed to cargo by the vessel. The fallacy of this position is at once apparent. It is directly contrary to the fundamental concept of general average.

In the case of a vessel carrying general cargo the several cargo owners owe one another no duty whatsoever, contractual or otherwise. No payment is made by one cargo owner to another. Yet these interests are obliged to contribute to one another in general average under the maritime law in the event of a sacrifice for the common benefit of ship and cargo. *Carver, Carriage of Goods by Sea,* 7th Ed. Section 364.

In *Swift & Company* v. *Glasgow Steam Shipping Company,* 280 Fed. 910 (S. D. N. Y. 1921), despite a bill of lading provision that the cargo was carried at the shipper's risk absolutely, the court held the cargo owner entitled to contribution in general average.

The obligations and rights under the law of general average are in no respect varied by reason of the common ownership of ship and cargo in which case obviously no freight is paid nor special contract involved. In the recent case of *Gulf Refining Company* v. *Universal Ins. Co.,* 32 F. (2d) 555 (1929), the Circuit Court of Appeals for the Second Circuit said on this subject:

> "It is authoritatively settled that general average depends upon the event of a common sacrifice for the benefit of all who are or may be interested in the voyage—not upon the existence of different contributory subjects. Contribution is a consequence. Neither the absence of a cargo nor the common ownership of vessel and cargo will affect the application of the principle of general average. *Potter* v. *Ocean Ins. Co.,* Fed. Cas. No. 11,335; *La Fonciere Compagnie* v. *Dollar,* 181 Fed. 945; *Risley* v. *Ins. Co. of North America,* 189 Fed. 529."

The same rule applies in England. See *Montgomery & Co.* v. *Indemnity Mutual Marine Ins. Company, Ltd.*

(1902) 1 K. B. 734, where it was held that even though ship and cargo both belonged to the same owner (no freight being paid) the law of contribution in general average still applies.

The practical aspect of this situation arises when different underwriters have insured a ship and cargo or one of them belonging to the same owner. In such cases it has never before been held that the underwriters were not entitled to receive general average contribution or were not obliged to contribute in general average to the same extent as if the ownership of vessel and cargo were separate and distinct. *Potter* v. *Ocean Ins. Co.*, Fed. Cas. No. 11,335; *Montgomery & Co.* v. *Indemnity Mutual Marine Ins. Co., Ltd.* (1902) 1 K. B. 734.

A specific example of the above situation is the case at bar, because a part of the cargo of the LOGAN was insured by the Atlantic Mutual Insurance Company. This underwriter now has an action pending in the United States Court of Claims to recover a general average contribution from the Government as owner of the LOGAN.

At the time of the average sacrifice involved here, a state of war existed between this country and Germany. The cargo aboard the LOGAN consisted chiefly of supplies for the American Army, supplies belonging to the American Red Cross and property of the Manila Railroad Company. That the army supplies were properly aboard the LOGAN can hardly be disputed. The transportation of supplies for the Red Cross by the United States without charge in time of war is specifically authorized by statute. *36 U. S. C. § 11**. That these Red Cross supplies were carried without payment of freight, pur-

*Appendix A, P. 25.

suant to statute, should not render them liable to sacrifice for the benefit of the vessel and other cargo without proportionate contribution from the other interests. Surely a shipowner owes no less duty to a cargo carried free by reason of statutory privilege than in the case of cargo on which freight has been paid. If this was not so the Master of the ship, instead of doing the best that the circumstances required, would be tempted to sacrifice property not owned by the United States. In fact any other holding in this case would result in penalizing cargo that the United States intended to benefit.

In the instant case a portion of the cargo was sacrificed in saving the common adventure. For this reason the decision of the Court of Claims holding that no general average situation exists operates in favor of the Government, which would otherwise be obliged to contribute in general average for the benefit of the cargo that was sacrificed. A contrary situation, however, is just as apt to arise where the sacrifice is made by the Government vessel. In such a case the rule announced by the court below would prevent the Government from recovering a general average contribution from the cargo. No reason is apparent for creating any such exception to the uniform rule of general average, which has received the sanction of this Court and those of England.

SECOND POINT.

THE GOVERNMENT IS SUBJECT TO THE LAW OF GENERAL AVERAGE IN RESPECT TO PUBLIC VESSELS AND HAS CONSENTED TO BE SUED IN SUCH CASES.

The inherent liability of the United States for general average has long been recognized although at one

time the liability was incapable of enforcement either by suit directly against the Government or *in rem* against property in the hands of an officer of the United States. *The Davis,* 10 Wall. 15.

The former lack of remedy in cases of this nature has been removed and the United States has consented to suits against it for general average liability.

28 U. S. C. § 250 (1) reads as follows:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> "First. All claims * * * upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable * * *."

Suits for contribution in general average come squarely within the above definition. These claims do not sound in tort, *The Eagle,* 8 Wall. 15, and the claimant would be entitled to redress in a court of admiralty if the United States were suable.

In *The Western Maid,* 259 U. S. 419 this court denied the right to proceed *in rem* against a public vessel for collision. But the claim in that case, unlike the LOGAN, arose out of a tort and the United States had not consented to be sued in cases sounding in tort. The prohibition against recovery even in such cases was promptly removed by the Public Vessels Act 46 U. S. C. § 781 evidencing the policy of Congress to place the Government on the same plane as a private shipowner for torts.

In *United States* v. *Cornell Steamboat Co.,* 202 U. S. 184, a salvor salved certain goods on which the United

States Government had collected customs duties. If the goods had been destroyed, the Government, pursuant to statute, would have had to make a refund of the duties collected. The salvage of the goods permitted the United States to retain the customs duties. The salvors filed suit against the United States *in personam* in the District Court under the Tucker Act, to recover salvage. This Court allowed recovery and stated at page 190:—

> "A claim for salvage may undoubtedly be founded upon an express contract, but where the services are rendered, as in this case, without request of an officer of the Government, and particularly where they are incidental to services rendered in the saving of private property, we do not think that claim can be said to arise upon any contract, express or implied, with the Government of the United States. But the claim may properly be said to be one for unliquidated damages in a case 'not sounding in tort' in respect of which the party would be entitled to redress in a court of admiralty, if the United States were suable."

This case, it is true, involved salvage rather than general average. The basic liability in both situations, however, is identical. This has been recognized by a long line of cases.

United States v. *Wilder,* Fed. Cas. 16,694 (Mr. Justice Story);
DuPont de Nemours v. *Vance et al.* (1856) 19 How. 162, 171;
The Siren (1868) 7 Wall. 152, 160;
The Davis, 10 Wall. 15, 18, 19;
The Lugano (C. C. A. 5) 222 Fed. 230.

In *The Davis,* 10 Wall. 15, 19, this Court stated categorically that the United States was liable both for

salvage and for general average. The only bar to the enforcement of such liability, which had theretofore existed, was removed by the Tucker Act as recognized in the *Cornell* case, *supra*. In that case this Court cited with approval the case of *United States* v. *Wilder*, Fed. Cas. No. 16,694, in which Mr. Justice Story, sitting on circuit, held that the United States was liable for general average and pointed out that the nature of the liability in general average and in salvage is precisely the same. See also *Phillips on Insurance* (5th Ed.) p. 111.

The liability of the Government for general average contribution was recognized by the Court of Claims in *Brown's Case*, 15 C. Cl. 392. In that case a schooner with a cargo of Government stores aboard was voluntarily stranded to prevent her from being pounded to pieces on a shallow bar. The Court of Claims held the Government liable in general average for its proportion of the sacrifice, saying:

> " 'Such a claim is clearly within the rule, that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests exposed to the common peril, and which was saved from the common danger by the sacrifice.' [citing]
>
> "This rule, it is now established, applies to the Government as well as to individuals. (*United States* v. *Wilder*, 3 Sumn. 309.) 'It rests' in the language of Mr. Justice Story, 'upon the ground of justice and equity' according to the maxim, 'qui sentit commodum, sentire debet et onus'."

On the same subject the following appears in *Arnould on Marine Insurance*, 10th Ed. Section 973, page 1248:

> "Goods belonging to government by the old laws did not contribute. Valin, however, thought they ought to do so; and Emerigon seems to have

> been of the same opinion. And it was held by Story, J. in the United States, after a most masterly examination of the principles of the supposed exemption that there was no ground for it either in law or practice, and that goods belonging to government are as liable to contribute as any other part of the cargo saved by the sacrifice. The practice among adjusters is to make them contribute."

The above cases recognize the principle that the Government is no less liable for general average contribution than a private individual and that the United States has consented to be sued in claims of this nature.

THIRD POINT.

THE GOVERNMENT, AS OWNER OF THE LOGAN, WAS UNDER THE DUTY OF HAVING PREPARED AN ADJUSTMENT OF GENERAL AVERAGE.

It is an established principle of maritime law that the vessel owner is under a legal obligation to have a general average adjustment prepared. The reason for this is that the owner of the vessel and his agents are familiar with the facts and being in control are the only ones who can protect the various interests. This obligation is stated by this Court in the case of *Ralli* v. *Troop*, 157 U. S. 386, 400:

> "After a voluntary sacrifice of part of the adventure, and the consequent escape of the rest from imminent peril, the owner of the ship, or in his absence the master as his agent, has the duty of having an adjustment made of the general average * * *."

See also *The Beatrice* (S. D. N. Y. 1924) 36 F. (2d) 99; *The Santa Ana* (C. C. A. 9th) 154 Fed. 800.

In the case at bar the United States as owner of the LOGAN was obligated to have prepared an adjustment of general average under the above rule. Because of the intricate problems involved in the determination of general average contribution in modern voyages in which so many varied cargo interests are concerned the custom has grown up of engaging professional average adjusters who are familiar with the difficult problems of accounting concerned in these cases. This custom is judicially recognized by the courts. In *Emelia S. de Perez,* 22 F. (2d) 585, 586 (D. C. Md.) it was said:

> "From the very origin of general average it appears to have been the duty of the master, and representative of the shipowners, to make general average adjustments * * *. The custom has, to be sure, grown up of engaging adjusters for convenience' sake, who can familiarize themselves with and work out the rather difficult problems of accounting that are involved in many of these cases."

The employment of Petitioner for the preparation of an average statement was, therefore, proper and in furtherance of the duty imposed upon the Respondent as owner of the LOGAN.

FOURTH POINT.

THE RESPONDENT IS LIABLE UNDER AN EXPRESS CONTRACT FOR THE VALUE OF PETITIONER'S SERVICES IN FURNISHING TO IT THE GENERAL AVERAGE STATEMENT.

The officer who ordered the general average statement from the Petitioner was expressly authorized by statute and regulation to enter into contracts of that general nature.

It is provided in *10 U. S. C.* §72 that

> **"The Quartermaster General, under the authority of the Secretary of War shall be charged with * * * the operation of utilities; * * * with the transportation of the army by land and water, including the transportation of troops and supplies by mechanical or animal means; with the furnishing of means of transportation of all classes and kinds required by the army; and with such other duties not otherwise assigned by law as the Secretary of War may prescribe * * *."**

Pursuant to this statute and under the authority of the Secretary of War, *United States Army Special Regulations No. 71**—*Army Transport Service* provide (Section 1, par. 1) that the Army Transport Service is organized as a special branch of the Quartermaster Corps for the purpose of transporting troops and supplies by water and that (Section 2, par. 8) included in the personnel of such organization there shall be a general superintendent at each home port *charged with the entire administration of the service, responsible for the operation of the vessels engaged therein and charged with the procuring and accounting for all services required* for and the maintenance of the transport service by such means as shall be in conformity with law.

That the courts will take judicial notice of the regulations of the executive departments of the Government has been frequently decided. *Thornton* v. *United States,* 271 U. S. 414; *Cosmos Exploration Company* v. *Gray Eagle Company,* 190 U. S. 301; *Caha* v. *United States,* 152 U. S. 211.

Petitioner's instructions to prepare a general average statement came in writing from the General Superinten-

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* Appendix B, P. 26.

dent and administrative officer of the Army Transport Service at San Francisco, the LOGAN's home port (R. 10, 13 and 15). It would be difficult to conceive of a more definite and express authorization for the act of an officer of the Government than that involved in this case.

In communicating with the Petitioner, Captain Williams enclosed a copy of the memorandum of the Judge Advocate General recommending to the Quartermaster General the reference of the matter to an average adjuster. While the recommendation of the Judge Advocate General could not create authority if none existed, it is at least strong evidence upon which an inference of authority may fairly be based, and nothing to rebut this inference appears in the record. The very fact that Captain Williams had the custody of the army file concerning the LOGAN fire is in itself evidence of his authority to deal in respect thereto.

Petitioner contends that not only did the General Superintendent of the Army Transport Service have authority, but that he had the duty as well, of having a general average statement prepared which would properly reflect the rights and liabilities of all concerned growing out of the general average sacrifice.

This contention is based upon what we submit is the clear liability of the United States to contribute in general average to sacrifices made in saving a Public Vessel.

If, however, this Court should ultimately hold that the United States is not liable to make a general average contribution in respect to a Public Vessel, the responsibility of the Government to pay for the general average statement would not be affected.

Going back to the situation as it existed at the time when this general average statement was ordered to be prepared, we find that a substantial claim had been made by the cargo against the United States for a con-

tribution. The Judge Advocate General of the Army had advised the Quartermaster General that the claim was a valid one and that the matter be referred to an average adjuster (R. 13). There was no decision of this or any other Court holding that the United States was not liable for general average contribution in respect to a Public Vessel.

At that time it certainly could not be said that it was clear the United States would not be held liable for the general average contribution. A final judicial decision in the matter was many years off. In view of the opinion of the Judge Advocate General, the General Superintendent had every reason to believe that an average statement would be required. In the meantime, if a proper investigation was not made, the details respecting the origin and character of the fire, the value of the ship and the various lots of cargo, and the extent of the cargo burned and damaged, would most certainly have been lost.

In the interest of protecting the United States, should it ultimately be held liable for the general average contribution in respect to the LOGAN, it was the duty of the General Superintendent of the Army Transport Service to do everything that a prudent man would do to protect the interests of the United States, and certainly in the light of the situation as it then existed, it was not only within the authority, but it was the duty of that officer as well, to have a general average statement prepared so that all the details in respect to the fire and the sacrifices might be preserved against the day when the question of ultimate liability should be determined by the courts.

What the General Superintendent of the Army Transport Service did here was only what any prudent ship-

owner would do in order to minimize a loss following a disaster, so that if ultimate liability was found on the merits, the damages could be kept to the minimum.

If this Court should ultimately find that the United States is liable for the general average contribution, the War Department has in its possession a full and adequate statement of the losses and the rights and liabilities of all concerned. If it did not have such a statement in its possession and the decision should be that the United States was liable for the average contribution, the delay and expense of collecting the data after all these years would be excessive as compared with the trifling sum that the Petitioner charged for its services in making the investigation when the facts were readily available.

The acts of the General Superintendent in contracting for Petitioner's services were in furtherance of his general duties as administrative officer of the Army Transport Service responsible for the operations of the vessels of that service. The powers conferred on him by statute and army regulations were broad, and some latitude of discretion must be allowed him. In the case of *Belcher* v. *Linn*, 24 How. 508, 522 this Court said:

> "The exercise of these powers involves knowledge, judgment, and discretion. We hold, as was held in that case, that when power or jurisdiction is delegated to any public officer or tribunal over the subject matter, and its exercise is confided to his or their discretion, the acts so done are in general binding and valid as to the subject matter."

The Petitioner dealt with the proper officer authorized to handle matters of this general nature and is entitled to compensation for its services, irrespective of

ultimate determination of the courts as to the operation of the laws of general average in situations such as that presented on the LOGAN.

In such a situation the court should reaffirm the principles recognized in its earlier cases, that

> "The courts will assume that an officer, in the performance of an official act, not only took all necessary preliminary steps required but acted within the circumference of his authority. There is a presumption in favor of the legality of his official act (*United States* v. *Coe*, 170 U. S. 681, 697), which must be overcome by satisfactory proof that the officer exceeded his powers (*Fouvergne* v. *United States*, 18 How. 470), and the court has found that there is not satisfactory proof of want of authority upon the part of the officers making the refunds in this case." *Lamport Mfg. Supply Co.* v. *United States*, 65 C. Cls. 579 at 610; *United States* v. *Arredondo*, 6 Pet. 691, 727-729; *Bartlett* v. *King*, 16 How. 263, 272; *United States* v. *Delaney*, 164 U. S. 282; *Holton* v. *United States*, 15 C. Cls. 276.

The exchange of letters between the General Superintendent of the Army Transport Service and the Petitioner constitutes a sufficient contract in writing under the provisions of *41 U. S. C. § 16* and *10 U. S. C. § 1221*. *American Smelting Company* v. *United States*, 259 U. S. 75; *United States* v. *Swift & Co.*, 270 U. S. 124.

Even if it be held that on the record of this case it does not appear that the General Superintendent had authority, express or implied, to order the preparation of such a general average statement, it is clear that under the decisions of this Court the Petitioner is entitled

to recover the fair value of its services in preparing the adjustment of general average at the request of a Government officer having at least colorable authority.

As owner of the LOGAN, the United States was under the duty of having prepared a general average statement. *Ralli* v. *Troop,* 157 U. S. 386, 400. The statement prepared by the Petitioner was delivered to and retained by the Government (R. 14).

It has been held by this Court that although a contract under which services were rendered to the United States may be void, one who renders those services may be entitled to recover their fair value.

In the case of *Clark* v. *United States,* 95 U. S. 539, 543, where the Government used a vessel of the claimant under a contract that was void by reason of not being in accordance with the controlling statute, this Court held that the claimant was entitled to the value of the use of the vessel during the time that it was in the hands of the Government agents.

In the case of *Crocker* v. *United States,* 240 U. S. 74, 81, this Court held that although no recovery could be had upon a contract with the Postmaster General because it was tainted with fraud and rescinded by him on that ground, nevertheless the claimant was entitled to a recovery upon *quantum valebat.*

It is apparent that under the above decisions, even if the Administrative Officer of the Army Transport Service were without authority to order this adjustment of general average (and Petitioner strongly urges that the authority of this officer is established), the Petitioner is entitled to recover its fair value upon implied contract for *quantum meruit.*

CONCLUSION.

THE DECISION OF THE COURT OF CLAIMS SHOULD BE REVERSED AND JUDGMENT ENTERED FOR THE PETITIONER IN THE SUM OF $2,365.12, WITH COSTS.

Respectfully submitted,

CLETUS KEATING,
STAUNTON WILLIAMS,
RICHARD L. SULLIVAN,
Counsel for Petitioner.

APPENDIX A.

36 U. S. C.

§11. "Transportation and subsistence. When the Red Cross co-operation and assistance with the land and naval forces in time of war or threatened hostilities shall have been accepted by the President, the personnel entering upon the duty specified in section 10 of this title shall, while proceeding to their place of duty, while serving thereat, and while returning therefrom, be transported and subsisted at the cost and charge of the United States as civilian employees employed with the said forces, and the Red Cross supplies that may be tendered as a gift and accepted for use in the sanitary service shall be transported at the cost and charge of the United States."

APPENDIX B.

United States Army
Special Regulations No. 71
Army Transport Service
By Order of the Secretary of War

Section I.

Organization.

1. The Army Transport Service is organized as a special branch of the Quartermaster Corps, United States Army, for the purpose of transporting troops and supplies by water.

• • • •

4*a*. The general organization of the personnel for each home port will be as follows, subject to such reduction as may be practicable.

(1) General superintendent.

• • • • • •

Section II.

General Duties of Officers.

8. *General Superintendent.—a.* Under peace conditions to be an officer of the Quartermaster Corps, with headquarters at the home port, and charged with the entire administration of the service, pursuant to its regulations and the requirements of law, except such matters as relate to the Medical Department. The general superintendent will, under peace conditions, receive his general instructions from the Quartermaster General, and all orders, excepting such as relate to the Medical Department, relative to the service will be made to and through him. He will be responsible for the efficient and economical administration of the service and the maintenance and

operation of the vessels engaged therein; for the accountability and disbursement of all funds furnished for the operation of the Transport Service except as otherwise directed; for the management and security of all property and for satisfactory service of all the officers and employees under his direction; for the assignment of authorized passengers to staterooms upon all transports leaving the home port; he will be charged under the provisions of law and Regulations of the Army Transport Service with the procuring and accounting for all services and supplies, except such as pertain to the Medical Department, required for the establishment and satisfactory maintenance of the service by such means as shall be in conformity with the law and be most advantageous and economical to the Government.

b. Under war conditions, where ports of embarkation have been established, the general superintendent will be an officer of the Quartermaster Corps on the staff of the commander of the port of embarkation, under whom he is charged with the entire administration of the Transport Service, pursuant to its regulations and the requirements of law, except such matters as relate to the Medical Department.

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No. 166

In the Supreme Court of the United States

OCTOBER TERM, 1932

JOHNSON & HIGGINS OF CALIFORNIA, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (R. 15–22) is reported in 1932 A. M. C. 680.

JURISDICTION

The judgment of the Court of Claims was entered April 4, 1932. (R. 23.) Petition for certiorari was filed June 21, 1932. (R. 23.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether an administrative officer of the Army Transport Service has authority to contract on behalf of the Government for the services of general average adjusters in preparing a statement of general average relative to cargo transported free of charge during the war period upon an Army Transport employed solely as a public vessel, part of such cargo having been voluntarily destroyed in extinguishing a fire?

STATEMENT

The following is a summary of the findings of the Court of Claims (R. 12–15):

On or about December 16, 1918, fire broke out on the United States Army Transport "Logan" which was then en route from San Francisco to Manila, carrying military supplies for American troops in Siberia and the Philippine Islands, supplies belonging to the government of the Philippine Islands, supplies belonging to the American Red Cross, and a small amount of personal property of United States Army officers. (R. 12, 15.) All of this cargo was being transported free of charge. (R. 15.) During the extinguishment of the fire, a portion of the cargo was damaged by water. (R. 13.) Some or all of the cargo aboard the ship was covered by insurance against general average losses. (R. 13.)

On August 22, 1922, an administrative officer of the Army Transport Service requested petitioner to prepare a statement of general average. This

request was based upon a recommendation of the Acting Judge Advocate General of the United States who expressed the opinion that the United States was liable for general average contribution. (R. 13.)

On or about January 5, 1927, petitioner forwarded to the General Superintendent, United States Army Transport Service, San Francisco, California, a general average statement in the usual form covering the damage caused by water during the extinguishment of the fire referred to above. (R. 14.) At the same time, petitioner presented a bill for its services and expenses in connection with the preparation of the statement. (R. 14.) The charges made were reasonable and the disbursements included were necessarily incurred. On or about May 22, 1928, the Comptroller General disallowed petitioner's claim as set forth in the bill. Petitioner then brought suit in the Court of Claims to recover the amount claimed, with interest. The Court of Claims gave judgment for the United States. (R. 23.)

ARGUMENT

I

It seems clear that if the United States was not under obligation to contribute in general average, no Government official had authority to enter into a contract for the preparation of a general average statement.

It has been held that the Government must contribute in general average when its cargo is trans-

ported like ordinary commercial cargo aboard a merchant ship. *United States* v. *Wilder,* Fed. Cas. No. 16694. Similarly, general average liability would probably rest upon the United States in the event of loss or damage to private cargo carried upon a Government vessel employed in the commercial trade. See the Suits in Admiralty Act of 1920, c. 95, 41 Stat. 525 (U. S. C., Title 46, sec. 741 *et seq.*). But we have found no authorities supporting petitioner's contention that general average principles are applicable to public vessels of the United States when carrying cargo of others as an accommodation while engaged in the performance of governmental functions.

The court below treated the question as one of first impression and after careful consideration correctly concluded that principles of general average had no application to a public vessel so engaged.

The obligation to contribute in general average is a peculiar obligation created by "the established law of the sea, in the light of and subject to which all owners of ships and cargoes undertake maritime adventures." *Ralli* v. *Troop,* 157 U. S. 386, 397. But the law of the sea, like all other branches of the law, is applicable to the sovereign only when and to the extent that the sovereign has expressed its consent to be governed thereby. *The Western Maid,* 257 U. S. 419, 432. Such consent has been given by the United States, subject to specified conditions, with respect to the operations of public ships engaged in mercantile activities. See Sec. 9

of the Shipping Act of 1916, c. 451, 39 Stat. 728, 730 (U. S. C. Title 46, sec. 808) and the Suits in Admiralty Act, *supra*. There is no basis in this case for implying consent on the part of the United States to be held liable for loss or injury arising out of the operations of public ships engaged, as was the ship here involved, in performing functions of Government. See *The Western Maid, supra; Ex Parte State of New York No. 2,* 256 U. S. 503. Certainly the act of Captain Williams in requesting petitioner to prepare a statement of general average did not constitute consent, for his authority was limited, and no administrative officer has implied authority to subject the Government to liability of this character.

It is a settled principle of the maritime law that an obligation to contribute in general average arises only when a sacrifice has been made for the safety of a common venture. *The J. P. Donaldson,* 167 U. S. 599; *Ralli* v. *Troop, supra.* As to ships privately owned, the application of general average principles is not affected by absence of cargo, common ownership of vessel and cargo, or nonpayment of freight charges. *Gulf Refining Co.* v. *Universal Insurance Company* 32 F (2d) 555 (C. C. A. 2d), certiorari denied, 280 U. S. 584. But we submit that the court below correctly held that when cargo is carried free of charge upon an Army Transport, engaged primarily in the transportation of military supplies, equipment, and personnel, the relation between the Government as carrier and the

owners of cargo is not such as to constitute them participants in a common venture, and that, therefore, the Government is not liable for losses to which the principles of general average would normally apply.

II

Even if there was an obligation on the part of the United States to contribute in general average, the Army Transport officer had no authority to enter into a contract for the services of general average adjusters. Liability on the part of the Government in contract can be created only by an officer who is lawfully authorized to make the contract in question or to perform acts from which a contract can be implied in fact. *Eastern Extension A. & C. Telegraph Company* v. *United States,* 251 U. S. 355, 366. There is nothing in the record to show that an administrative officer of the Army Transport Service is authorized to enter into contracts for the preparation of statements of general average. On the contrary, it may reasonably be supposed that such services could have been adequately performed by the accounting and auditing officers of the Government. It is well settled that persons dealing with public officers are bound to inquire as to the extent of their authority. *Hume* v. *United States,* 132 U. S. 406.

Petitioner contends that even if the agreement was void by reason of lack of authority on the part of the contracting officer, nevertheless it is entitled to recover the fair value of the services rendered.

The authorities cited do not support this contention. In those cases there was no question of lack of authority. The contracts failed because of fraud in one case and failure to reduce the agreement to writing in the other. Moreover, in the instant case there is nothing to show that the Government derived any benefit from the petitioner's services, and recovery in *quantum meruit* is based upon the value to the recipient of the services or materials furnished. *Thomas* v. *Brownsville, etc., R. R. Company,* 109 U. S. 522, 525.

CONCLUSION

The decision of the Court below is correct and is not in conflict with any other decision. The question presented does not seem to be of sufficient general importance to warrant review by this Court. The petition should be denied.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
WHITNEY NORTH SEYMOUR,
Special Assistant to the Attorney General.
CHARLES F. KINCHELOE,
J. FRANK STALEY,
H. BRIAN HOLLAND,
WILLIAM H. RILEY, JR.,
Attorneys.

AUGUST, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

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No. 166

In the Supreme Court of the United States

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OPINION BELOW

The opinion of the Court of Claims (R. 15–22) is not officially reported. It was published in 1932 A. M. C. 680.

JURISDICTION

The judgment of the Court of Claims was entered April 4, 1932. (R. 23.) A petition for certiorari was filed June 21, 1932 (R. 23), and the writ was granted October 10, 1932. (R. 25.) Jurisdiction is conferred upon this Court by Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the circumstances of this case, an administrative officer of the Army Transport Service had authority to contract on behalf of the

Government for the services of general average adjusters in preparing a statement of general average relative to cargo transported free of charge upon an army transport employed as a public vessel, part of such cargo having been destroyed in extinguishing a fire.

STATEMENT

The following is a summary of the findings of the Court of Claims (R. 12–15):

On or about December 16, 1918, fire broke out on board the U. S. Army Transport *Logan,* which was then en route from San Francisco to Manila, carrying military supplies for American troops in Siberia and the Philippine Islands, supplies belonging to the American Red Cross, supplies belonging to the Government of the Philippine Islands, and a small amount of personal property belonging to officers of the United States Army. (R. 12, 14.) All of this cargo was transported free of charge. (R. 15.) In extinguishing the fire, some of the cargo was damaged by water. (R. 13.) Some, if not all, of the cargo was covered by insurance against general average losses. (R. 13.)

By letter dated August 22, 1922, an administrative officer of the Army Transport Service of the Quartermaster Department, requested petitioner, a corporation doing business as average adjusters and insurance brokers, to prepare a statement of general average. Attached to this letter was a letter from the Acting Judge Advocate General to the Quartermaster General which referred to a

claim of the marine underwriters for contribution by the Government in general average and, after expressing the opinion that the claim was valid, recommended "that prompt steps be taken to ascertain the amount due the insurance company by way of contribution in general average," and, therefore, "that the matter be referred to a general average adjuster." (R. 13.)

Pursuant to the instructions contained in the letter of August 22, 1922, petitioner made a thorough investigation of the facts relative to the fire on the *Logan*, and on or about January 5, 1927, forwarded a general average statement to the General Superintendent of the United States Army Transport Service, at San Francisco. (R. 14.) At the same time petitioner presented a bill for its services and expenses in connection with the preparation of the statement, amounting to $2,265.12. (R. 14.) The charges made were reasonable and the disbursements included were actually incurred. (R. 14.)

On or about May 22, 1928, the Comptroller General advised the petitioner that its claim was disallowed. (R. 14.) No payment having been made, petitioner brought this suit in the Court of Claims to recover the amount thereof, with interest from December 31, 1926, the date appearing on the general average statement. (R. 6–9, 14.) The Court of Claims decided in favor of the United States. (R. 12–23.)

DISCUSSION

The court below decided the case in favor of the Government, holding that the Government is not liable to contribute in general average for damage to cargo carried free of charge on public vessels, and that none of its officers has authority to contract for the preparation of a general average statement in such a case. In its opinion the court declared that there were no guiding precedents determinative of the question whether the rules of general average apply where cargo is carried free. Upon consideration of the principles underlying the law of general average the court concluded that contribution is allowed only in cases of sacrifice made for the common good of the owners of the vessel and the owners of the cargo, who "have a common purpose and are engaged in the joint enterprise of having the cargo conveyed and landed at the point of destination." Emphasizing the importance of the fact that the owner of the vessel in such cases is paid not merely for transporting the cargo but for its care as well, and is responsible for its delivery at destination, the court concluded that there was, in the instant case, no joint adventure or enterprise with which the Government was concerned. Pointing to the fact that the Government made no contract, express or implied, with reference to conveying or safeguarding the cargo, the court said (R. 17):

> The acts of the defendant [the Government] with reference to the cargo were

> merely permissive * * *. The defendant permitted the cargo owners to place their cargo on board, but neither contracted to transport it nor to safeguard it.

Having thus determined that the Government was not liable in the case at bar to contribute in general average, the court concluded that the Government had no interest in the statement of general average, and "consequently no one could have any authority to contract" for the preparation of such a statement.

The court also held that the officer who contracted for the preparation of the general average statement had no authority to do so, even if it could be concluded that the Government was liable to contribute in general average, stating that "even if it was the duty of the Government, as owner of the vessel, to furnish a statement of general average our attention has not been called to any statutory provision, or any implication therefrom, which would authorize any person to bind the Government to pay for a statement of general average"; and that "it does not follow that even if a duty was cast upon the Government to furnish a general average statement, any official had been given authority to order one made." "The preparation of the statement for general average," the court said, "was not for the benefit of the Government, but for the benefit of those who had insured the cargo."

We believe the conclusion that the United States was not liable to the cargo underwriters for contribution in general average was correct,[1] but do not think it follows that the contract in suit was unauthorized.

The *Logan* was an army transport at the time the general average statement was ordered by "the general superintendent and administrative officer of the United States Army Transport Service." (R. 15.) The vessel was under the supervision and control of the Army Transport Service, which was a branch of the Quartermaster's Department of the Army.[2] Claim had been made by the cargo underwriters for contribution by the United States in general average. The Quartermaster General, who was in charge of the Army Transport Service, had referred this claim to the Judge Advocate General of the Army, who had advised that the claim was valid and that the matter should be referred to a general average adjuster. This information was transmitted, through official channels, to the General Superintendent, by whose authority the preparation of a general average statement was ordered. (R. 9–10.) When the

[1] The question will be presented in litigation now pending in the Court of Claims between the Government and the underwriters.

[2] See Act of June 4, 1920, c. 227, Subchapter I, sec. 9, 41 Stat. 759, 766 (U. S. C., Title 10, sec. 72), quoted in petitioner's brief, p. 18; Special Regulations No. 71, Army Transport Service, 1918, Secs. I and II, quoted in petitioner's brief, Appendix, pp. 26–27; Army Appropriation Act of June 30, 1922, c. 253, 42 Stat. 716, 730.

order was given there was no decision in any court as to the liability of the Government to contribute in general average, where the cargo damaged was carried free of charge upon a public vessel. Indeed, the court below regarded the question as one of first impression. (R. 17.)

Under these circumstances the officer would have been delinquent in the performance of his duty if in the face of what appeared to be a valid claim he had neglected to order the general average statement. Even had the Government's liability appeared doubtful, it would clearly have been the part of wisdom to preserve the basis for adjustment of the asserted liability. To have declined to do so when counsel expressed no doubt as to the existence of liability would have been sheer folly. The duty to prepare the statement, if any existed, was not upon the cargo underwriters but upon those who controlled the operation of the ship. See *Ralli* v. *Troop,* 157 U. S. 386, 400. To have deferred its preparation until ultimate liability should be determined in the courts would have incurred the risk of additional difficulty and expense in its preparation and of the loss of information necessary in its preparation.

We can not doubt that the officer charged with the entire administration of the Army Transport Service, in which the "Logan" was employed and operated, was under the circumstances of this case authorized to contract for the preparation of a general average statement. The order for this

statement was given by the General Superintendent and administrative officer of this service (R. 10, 15), who was charged with the entire administration thereof. (See statutes and Regulations cited in Footnote 2, *supra*.)

CONCLUSION

We respectfully call the attention of the Court to the fact that litigation is pending between the Government and the underwriters in which the question as to the liability of the United States to make contribution in general average will be presented upon a record disclosing all of the facts surrounding the shipment of the cargo. If our views as to the authority to make the contract in suit are correct it will not be necessary for this Court to determine that question in this case. While we are of the opinion that the conclusion of the court below that the contract in suit was unauthorized was wrong, we submit the case without formal confession of error for the decision of this Court.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
H. BRIAN HOLLAND,
W. MARVIN SMITH,
Attorneys.

DECEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 166

JOHNSON & HIGGINS OF CALIFORNIA,

Petitioner,

v.

THE UNITED STATES.

MOTION OF ATLANTIC MUTUAL INSURANCE COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE

J. M. RICHARDSON LYETH,
Counsel for Atlantic Mutual
Insurance Company as *Amicus Curiae.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No.

JOHNSON & HIGGINS OF CALIFORNIA,
Petitioner,
v.
THE UNITED STATES.

Motion for Leave to File Brief as Amicus Curiae.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Atlantic Mutual Insurance Company, respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in connection with the application of the petitioner in this case for a writ of certiorari.

J. M. RICHARDSON LYETH,
Counsel for Atlantic Mutual
Insurance Company as *Amicus Curiae.*

We hereby consent to the filing of the annexed brief by the Atlantic Mutual Insurance Company as *amicus curiae* in connection with the application for a writ of certiorari by Johnson & Higgins of California.

CLETUS KEATING,
Counsel for Petitioner,
Johnson & Higgins of California.

.....,
Counsel for Respondent,
The United States.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No.

JOHNSON & HIGGINS OF CALIFORNIA,
Petitioner,
v.
THE UNITED STATES.

BRIEF OF ATLANTIC MUTUAL INSURANCE COMPANY AS AMICUS CURIAE.

I.

Preliminary Statement.

The Atlantic Mutual Insurance Company is plaintiff in a suit now pending in the United States Court of Claims in which it seeks to recover the sum of Forty-eight thousand ninety-nine and 40/100 Dollars ($48,099.40) with interest, alleged to be owing to it as a contribution in general average by the United States as owner of the Transport "Logan" and of certain cargo carried on the Transport "Logan" on a voyage from San Francisco to Manila, which began on December 5, 1918. The Atlantic Mutual Insurance Company insured other

cargo belonging to the Government of the Philippine Islands and to the Manila Railroad Company against marine risks, including fire, and upon payment for the damage to such goods by reason of the extinguishing of the fire by the flooding of the hold, it became subrogated to such claims as the owners of that cargo had in general average against the owner of the vessel and the owners of other cargo on board. This was the same voyage with respect to which the petitioner in this case, Johnson & Higgins of California, was employed by the War Department to prepare a general average statement. The Court of Claims denied recovery to Johnson & Higgins of California for the amount of their charges for services in preparing such general average statement, upon the ground that there had in fact been no general average because cargo had been carried free of any charge for freight. This holding by the Court of Claims, if not reversed, will bar recovery in the suit brought by the Atlantic Mutual Insurance Company and now pending in the Court of Claims but not yet tried. The Atlantic Mutual Insurance Company believes the decision of the Court of Claims in the suit brought by Johnson & Higgins of California, is erroneous for the reasons hereinafter stated in this brief and therefore respectfully urges that the petition by Johnson & Higgins of California for a writ of certiorari to the Supreme Court of the United States should be granted.

II.

Argument.

POINT A.

The Court of Claims erred in holding that there could be no general average unless freight is paid by cargo.

General average has been recognized by the maritime law since ancient times. Its purpose is to avoid the injustice which would be inflicted on the owner of cargo which is jettisoned or otherwise destroyed for the benefit of all interests at risk in the voyage, if the owner of the cargo thus destroyed were required to bear the entire loss and the interests benefited made no contribution thereto. Its purpose also is to leave the Master free to exercise his discretion as to the best means to be taken to extricate a vessel from a situation of danger, without the necessity of considering whether the loss would fall upon one cargo owner or another or upon the vessel owner. Otherwise, in times of peril, the Master might desire to protect one cargo owner as against another, or might unwisely sacrifice cargo rather than some portion of the ship. This is well stated in Lowndes' General Average, 6th Ed., at pages 14 and 15, as follows:

> "Nothing can more tend to the preservation of life and property at sea than that the officer entrusted with this important function should be protected in the exercise of it from whatever may tend to bias or disturb his judgment at that critical moment. He is, however, the paid servant of the shipowner, liable to dismissal if he displeases him. How is he to avoid partiality, or the suspicion of partiality, when he has to determine by what sacrifice he shall avert a common danger, and to choose, perhaps, between a jettison of cargo and the cutting away of a mast, or

> bearing up for a port of refuge? Will there not be frequent complaints, well or ill-founded, by the merchant or his underwriters, that a costlier sacrifice of cargo has been preferred when a measure less destructive, but involving a loss to the shipowner would have been equally effectual? The rule of a general contribution, on the other hand, by rendering it immaterial whose property is taken in the first instance, and material only that that should be taken which will most surely and effectually, and at least cost, save the whole, does away with this conflict in the captain's mind between interest and duty, leaves him alone with purely nautical considerations, and thus, no doubt, does more than any statesman or philanthropist can effect for the preservation of life and property at sea. The utility of the rule of general average thus no doubt explains its universality and permanence."

The foregoing considerations are particularly important where, as in the case of the Transport "Logan," the owner of the vessel was also the owner of part of the cargo.

Where the sacrifice is made for the common benefit of all interests at risk in the voyage, the law of general average therefore requires that the loss be apportioned amongst all the interests benefited. Thus in *Hobson* v. *Lord,* 92 U. S. 397, the Court said:

> "Sacrifices, voluntarily made in the course of a voyage, of part of the ship, or part of the cargo, to save the whole adventure from an impending sea peril, or extraordinary expenses incurred for the joint benefit of both ship and cargo, and which became necessary in consequence of a common peril of the kind, are regarded as the proper objects of general average."

The duty to contribute in general average arises by reason of the receipt of the benefit of the sacrifice by interests which were not sacrificed. Such duty to contribute is broadly equitable in nature and is not de-

pendent upon the existence of any express contract in any specific form.

In *Swift & Co.* v. *Glasgow Steam Shipping Co.,* 280 Fed. 910, the bill of lading provided that goods were carried at the owner's risk. Nevertheless, the District Court held that this did not bar general average. Likewise in *Crooks* v. *Allan,* 5 Q. B. D. 38, an exception in the bill of lading relieved the ship owner from liability for all damage that could be insured against. General average could be insured against, but the ship owner was nevertheless held liable to contribute in general average. The duty to contribute in general average is thus not dependent upon liability of the ship owner for loss or damage to the goods.

The Court of Claims in its opinion held that in the present case there was "no common purpose, no joint enterprise or adventure in which defendant was concerned," because freight was not paid. This, it is respectfully submitted, is erroneous and is based upon a confusion as to what constitutes the "common adventure" which is the starting point of general average. The Court of Claims apparently assumed that there must be a common economic enterprise, i. e., that the cargo must be bound to the ship by contracts for which valuable consideration had been given. The common adventure, however, which is the basis of general average, is the fact that cargo goes to sea in a vessel and that the two encounter perils of the sea together. The adventure is the physical subjection of both hull and cargo concurrently to the perils of the sea. The fundamental purpose of general average, namely, the equitable distribution of loss and the consequent elimination of any bias in the captain's mind as to which interest should be sacrificed in time of peril, is present whenever cargo goes to sea in a vessel, regardless of whether or not freight is paid.

In further proof of the erroneous nature of the result reached by the Court of Claims is the fact that general

average is always adjusted between cargo shipped by different persons, although there is no contract between them, nor is there any consideration which passes from one cargo owner to the other. *Carver, Carriage of Goods by Sea* (7th Ed.), Sec. 364. The cargo which is saved by the sacrifice must nevertheless contribute its share to make good the loss to the owner of the cargo which was sacrificed.

Moreover, it has been held that where vessel and cargo are owned by the same owner, there can still be general average. *Montgomery & Co.* v. *Indemnity Mutual Insurance Co.* (1902), 1 K. B. 734. At page 740, the Court said:

> "The object of this maritime law seems to be to give the Master of the ship absolute freedom to make whatever sacrifice he thinks best to avert the perils of the sea, without any regard whatsoever to the ownership of the property sacrificed; and, in our judgment, such a sacrifice is a general average act, quite independently of unity or diversity of ownership."

In *Potter* v. *Providence Washington Insurance Company,* 19 Federal Cases No. 11,336, both ship and cargo were owned by the plaintiff, but the ship alone was insured. The plaintiff sued the underwriter for reimbursement for general average, and the underwriter claimed as a deduction the amount of general average owing to the plaintiff, as owner of the ship, with respect to the cargo owned by the plaintiff. Mr. Justice STORY held the deduction to be valid. See also *Greely* v. *Tremont Insurance Company,* 9 Cushing 415; *La Fonciere, etc.* v. *Dollar,* 181 Fed. 945.

The payment of freight by cargo is therefore in no sense a requisite to the liability of the owner of either ship or cargo to contribute in general average.

POINT B.

The Supreme Court should grant the petition for Writ of Certiorari because of the importance of a correct decision on a basic question of general average.

This is believed to be a case of first impression on the question whether an obligation to pay freight is a necessary condition to the recovery of a general average contribution by the owner of cargo. This in turn involves the converse proposition, should a vessel owner be barred from recovering general average from cargo which he was carrying free? Counsel have been unable to find any decisions in point other than those referred to in Point A.

This question relates to the fundamental basis of the law of general average, and it is of the utmost importance that it should be correctly decided.

General average has always been founded upon broad equitable grounds, and it would be unfortunate to have a decision which based the obligation of general average upon the narrow technical question whether there was consideration for the carriage of cargo paid or payable to the vessel owner. It is respectfully submitted that the various cases cited above show that the decision of the Court of Claims is based upon a serious misapprehension as to the basic purpose and nature of general average, and is not in accord with the existing decisions and the general maritime law as to general average.

CONCLUSION.

The petition for Writ of Certiorari should be granted by the Supreme Court.

Respectfully submitted,

J. M. RICHARDSON LYETH,
Counsel for Atlantic Mutual
Insurance Company as *Amicus Curiae.*

SUPREME COURT OF THE UNITED STATES.

No. 166.—October Term, 1932.

Johnson & Higgins of California, Petitioner, *vs.* The United States.	On Writ of Certiorari to the Court of Claims.

[December 19, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The material facts as found by the Court of Claims are these: In December, 1918, fire broke out on the United States Army Transport Logan bound from San Francisco to Manila with a general cargo belonging to various owners. The Logan was under the operation, management and control of the United States. The cargo consisted in part of military supplies for American troops in Siberia and the Philippine Islands, supplies belonging to the government of the Philippine Islands, supplies belonging to the American Red Cross, and a small amount of personal property of officers of the United States Army, all of which was being transported free of charge. In extinguishing the fire, some of the cargo was damaged by water and some or all of the cargo was covered by insurance against general average losses.

In August, 1922, the general superintendent and administrative officer of the Army Transport Service of the Quartermaster Corps requested the petitioner, a corporation doing business as average adjuster and insurance broker, to prepare "a statement of general average in order that the responsibility of the various parties concerned may be determined". Attached to this request was a communication from the Acting Judge Advocate General of the United States to the Quartermaster General which referred to the claim of the marine underwriters for contribution in general average and stated: "The claim being a valid one, it is therefore recommended that prompt steps be taken to ascertain the amount due the insurance company by way of contribution in general average. For this purpose, it is recommended that the matter be

referred to a general average adjuster". Petitioner accordingly made its investigation and prepared and submitted to the general superintendent of the Army Transport Service at San Francisco the usual general average statement. For this service and incidental disbursements, petitioner made the "usual, customary and reasonable charge" and, upon disallowance of the claim by the Comptroller General, petitioner brought this suit.

The Court of Claims held that the Government was not liable to contribute in general average and that, in consequence, none of its officers had authority to contract for the preparation of a general average statement. The Court of Claims dismissed the petition and this Court granted certiorari.

The Solicitor General, while not formally confessing error, and while reserving the question whether the Government was liable to contribute in general average, is in accord with petitioner's contention that the proper officer of the Government was authorized to employ petitioner for the purpose stated. We are of the opinion that this view is correct. In the circumstances, petitioner's right did not depend upon the determination of the liability of the Government to contribute in general average. The question of that liability could not be regarded as free from doubt. The cargo underwriters had made claim for contribution and the Judge Advocate General of the Army had advised that the claim was valid. On receiving this information, it was the duty of the officer responsible for the operation of the vessel to prepare the general average statement in order that the basis for adjustment might be available. *Ralli* v. *Troop*, 157 U. S. 386, 400. That duty, in this instance, apart from the question of the liability of the Government for general average as to which it is not now necessary to express an opinion, lay with the general superintendent and administrative officer of the Army Transport Service, and in order that he might properly perform it, he was entitled to avail himself of the assistance of general average adjusters.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.